

No. 89-1433-ADY
Status: GRANTED

Title: United States, Appellant
v.
Shawn D. Eichman, David Gerald Blalock and Scott W.
Tyler

Docketed:
March 13, 1990

Court: United States District Court
for the District of Columbia

Vide:
89-1434

Counsel for appellant: Solicitor General

Counsel for appellee: Kraut, Nina, Kunstler, William,
Cole, David, Hamilton III, Charles S.

15 copies mo to expedite rec'd 031390 - See 89-1434

Entry	Date	Note	Proceedings and Orders
1	Mar 13 1990	G	Statement as to jurisdiction filed.
2	Mar 13 1990	G	Motion of the Solicitor General to expedite consideration of the jurisdictional statement filed.
3	Mar 13 1990		DISTRIBUTED. March 16, 1990 (CONFERENCE).
4	Mar 13 1990	X	Brief amici curiae of Speaker and Leadership Group of the House of Representatives filed.
5	Mar 14 1990		Opposition of Eichman, et al. to motion of appellant United States to expedite consideration of the jurisdictional statement filed.
6	Mar 15 1990	X	Brief of appellant in reply to appellees' opposition to motion to expedite consideration and establish expedited schedule filed.
7	Mar 16 1990		Motion of the Solicitor General to expedite consideration of the jurisdictional statement GRANTED. to the extent that motions to dismiss or affirm shall be received by the Clerk on or before noon, Monday, March 26, 1990.
9	Mar 23 1990		Brief of appellees Eichman, et al. in opposition filed. VIDED.
8	Mar 26 1990		REDISTRIBUTED. March 30, 1990
10	Mar 26 1990	G	Motion of Speaker and Leadership Group of the House of Representatives for leave to file, as amici curiae, a printed brief that differs from the previously submitted typewritten brief filed.
11	Mar 30 1990		Motion of Speaker and Leadership Group of the House of Representatives for leave to file, as amici curiae, a printed brief that differs from the previously submitted typewritten brief GRANTED.
12	Mar 30 1990		The motion of the Solicitor General to expedite consideration of the statements as to jurisdiction is granted. In these cases probable jurisdiction is noted. The brief of the Solicitor General is to be filed with the Clerk of the Court and served upon appellees on or before 3:00 p.m., Wednesday, April 18, 1990. The brief(s) of the appellees is to be filed with the Clerk of the Court and served upon the Solicitor General on or before 3:00 p.m., Thursday, May 3, 1990. Any reply brief is to be filed with the Clerk of the Court and served

Entry	Date	Note	Proceedings and Orders
			upon appellees on or before 3:00 p.m., Thursday, May 10, 1990. The cases are set for oral argument at 10:00 a.m., Monday, May 14, 1990.

13	Mar 30 1990	X	Brief amicus curiae of Speaker and Leadership Group of the House of Representatives filed. VIDE.
14	Apr 4 1990	G	Application (A89-692) by Speaker and Leadership Group of the House of Representatives to file a brief as amicus curiae in excess of page limits, submitted to The Chief Justice.
15	Apr 4 1990	D	Motion of appellees for divided argument filed.
16	Apr 4 1990		Application (A89-692) granted by the Chief Justice, allowing a maximum of 40 pages.
17	Apr 9 1990	G	Application (A89-706) by United States Senate to file a brief as amicus curiae in excess of page limits, submitted to The Chief Justice.
18	Apr 11 1990		Application (A89-706) granted by the Chief Justice, allowing a maximum of 40 pages.
19	Apr 11 1990		Record filed.
		*	Certified copy of original record.
20	Apr 12 1990		Joint appendix filed. VIDE.
21	Apr 16 1990	G	Motion of appellee Darius Strong for leave to proceed further herein in forma pauperis filed.
22	Apr 16 1990	G	Motion of appellee Darius Strong for appointment of counsel filed.
23	Apr 16 1990		DISTRIBUTED. APRIL 20, 1990. (MOTION FOR LEAVE TO PROCEED FURTHER HEREIN IN FORMA PAUPERIS AND MOTION FOR APPOINTMENT OF COUNSEL).
24	Apr 17 1990		Brief amicus curiae of Southeastern Legal Foundation, Inc. filed. VIDE.
28	Apr 17 1990		Brief of appellant United States filed. VIDE.
29	Apr 17 1990		Brief amicus curiae of Governor Mario M. Cuomo filed. VIDE.
25	Apr 18 1990		Brief amicus curiae of Senator Joseph R. Biden, Jr, filed. VIDE.
26	Apr 18 1990		Brief amicus curiae of United States Senate filed. VIDE.
		*	Ten copies of material lodged in support.
27	Apr 18 1990		Brief amicus curiae of Speaker and Leadership Group of the House of Representatives filed. VIDE.
30	Apr 23 1990		Motion of appellee Darius Strong for leave to proceed further herein in forma pauperis GRANTED.
31	Apr 23 1990		Motion for appointment of counsel GRANTED and it is ordered that Charles S. Hamilton, III, Esquire, of Seattle, Washington, is appointed to serve as counsel for the appellee Darius Strong in this case. for the purpose of filing a brief.
32	Apr 24 1990	G	Motion of appellees Eichman, Blalock, Tyler, Haggerty, Garza and Campbell for leave to proceed further herein in forma pauperis filed.
33	Apr 25 1990		CIRCULATED.
34	Apr 30 1990		Motion of appellees for divided argument DENIED.
35	Apr 30 1990		Motion of appellees Eichman, Blalock, Tyler, Haggerty,

Entry	Date	Note	Proceedings and Orders
			Garza and Campbell for leave to proceed further herein in forma pauperis GRANTED.
36	Apr 30 1990		Brief of appellee Darius Strong filed. VIDED.
37	May 1 1990	X	Brief of appellees Eichman, et al. filed. VIDED.
38	May 2 1990	X	Brief amici curiae of ACLU, et al. filed. VIDED.
39	May 2 1990	X	Brief amicus curiae of NAACP filed. VIDED.
40	May 2 1990	X	Brief amici curiae of Jasper Johns, et al. filed. VIDED.
43	May 2 1990		Lodging received. (10 copies).
41	May 3 1990	X	Brief amici curiae of People for the American Way, et al. filed. VIDED.
42	May 3 1990	X	Brief amicus curiae of American Bar Association filed. VIDED.
44	May 3 1990	G	Motion of Association of Art Museum Directors, et al. for leave to file a brief as amici curiae, out-of-time, filed.
45	May 9 1990	X	Reply brief of appellant United States filed. VIDED.
46	May 14 1990		Motion of Association of Art Museum Directors, et al. for leave to file a brief as amici curiae, out-of-time, GRANTED.
47	May 14 1990		ARGUED.

89 - 1433 ①

No.

Supreme Court, U.S.
FILED

MAR 13 1990

JOSEPH F. SAPNIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1989

UNITED STATES OF AMERICA, APPELLANT

v.

SHAWN D. EICHMAN, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT

KENNETH W. STARR
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QUESTION PRESENTED

Whether the First Amendment prohibits the United States from prosecuting appellees for knowingly burning a flag of the United States, in violation of 18 U.S.C. 700(a), as amended by the Flag Protection Act of 1989, Pub. L. No. 101-131, § 2(a), 103 Stat. 777.

II

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, Shawn D. Eichman, David Gerald Blalock, and Scott W. Tyler were defendants in the district court and are appellees here.

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In the Supreme Court of the United States

OCTOBER TERM, 1989

No.

UNITED STATES OF AMERICA, APPELLANT

v.

SHAWN D. EICHMAN, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the district court (App., *infra*, 1a-18a) is not yet reported.

JURISDICTION

The district court issued an order (App., *infra*, 19a) dismissing the criminal informations on March 5, 1990. A notice of appeal to this Court (App., *infra*, 20a-21a) was filed on March 6, 1990. The jurisdiction of this Court is invoked under Section 3 of the Flag Protection Act of 1989, Pub. L. No. 101-131, 103 Stat. 777 (to be codified at 18 U.S.C. 700(d)), which provides:

(d)(1) An appeal may be taken directly to the Supreme Court of the United States from any interlocutory or final judgment, decree, or order issued by a United States district court

ruling upon the constitutionality of subsection (a).

(2) The Supreme Court shall, if it has not previously ruled on the question, accept jurisdiction over the appeal and advance on the docket and expedite to the greatest extent possible.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides, in relevant part: "Congress shall make no law * * * abridging the freedom of speech * * *."

Section 700 of Title 18, United States Code, as amended effective October 28, 1989, by the Flag Protection Act of 1989, Pub. L. No. 101-131, §§ 1-3, 103 Stat. 777, provides:

(a)(1) Whoever knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon any flag of the United States shall be fined under this title or imprisoned for not more than one year, or both.

(2) This subsection does not prohibit any conduct consisting of the disposal of a flag when it has become worn or soiled.

(b) As used in this section, the term "flag of the United States" means any flag of the United States, or any part thereof, made of any substance, of any size, in a form that is commonly displayed.

(c) Nothing in this section shall be construed as indicating an intent on the part of Congress to deprive any State, territory, possession, or the Commonwealth of Puerto Rico of jurisdiction over any offense over which it would have jurisdiction in the absence of this section.

(d)(1) An appeal may be taken directly to the Supreme Court of the United States from

any interlocutory or final judgment, decree, or order issued by a United States district court ruling upon the constitutionality of subsection (a).

(2) The Supreme Court shall, if it has not previously ruled on the question, accept jurisdiction over the appeal and advance on the docket and expedite to the greatest extent possible.

STATEMENT

In *Texas v. Johnson*, 109 S. Ct. 2533 (1989), this Court held that a state statute outlawing desecration of venerated objects, as applied to the burning of an American flag, violated the First Amendment. That decision raised concerns in the Executive and Legislative Branches over the vitality of an analogous federal provision, 18 U.S.C. 700(a) (1988).¹ As a result, Congress amended that statute with the Flag Protection Act of 1989, Pub. L. No. 101-131, §§ 1-3, 103 Stat. 777. As amended effective October 28, 1989, Section 700(a)(1) makes criminally liable those persons who, without regard to the content of their expression, physically damage or mistreat a flag of the United States. See p. 2, *supra*.

On October 30, 1989, appellees participated in a demonstration outside the Capitol, in Washington, D.C., and burned several American flags. Appellees were each charged in separate criminal informations with one count of knowingly burning a flag of the United States, in violation of 18 U.S.C. 700(a), as amended by the Flag Protection Act of 1989, Pub. L. No. 101-131, § 2(a), 103 Stat. 777. The district court

¹ Former Section 700(a) made criminally liable:

Whoever knowingly casts contempt upon any flag of the United States by publicly mutilating, defacing, defiling, burning, or trampling upon it * * *.

granted a joint motion to dismiss the flag-burning charges, holding that the Flag Protection Act of 1989, as applied to appellees' conduct, violated the First Amendment.

A. *Texas v. Johnson*

The defendant in *Texas v. Johnson*, *supra*, burned an American flag during a political demonstration in Dallas. He was convicted in Texas state court of desecrating a venerated object, a misdemeanor offense in violation of Tex. Penal Code § 42.09(a)(3) (1989). Under that provision, an individual "commit[ted] an offense if he intentionally or knowingly desecrates * * * a state or national flag," *ibid.*; the statute defined "desecrate" to "mean[] deface, damage, or otherwise physically mistreat in any way that the actor knows will seriously offend one or more persons likely to observe or discover his action," *id.* § 42.09(b). Johnson contended before the Texas state appellate courts that the First Amendment prohibited his criminal conviction for flag burning. The Texas Court of Criminal Appeals agreed. See *Texas v. Johnson*, 109 S. Ct. at 2536-2537.

On June 21, 1989, this Court affirmed that ruling by a sharply divided vote, holding that the Texas statute outlawing desecration of venerated objects, as applied to the burning of an American flag, violated the First Amendment. *Texas v. Johnson*, 109 S. Ct. at 2536-2548 (Brennan, J., joined by Marshall, Blackmun, Scalia, and Kennedy, JJ.); *id.* at 2548 (Kennedy, J., concurring); *id.* at 2548-2555 (Rehnquist, C.J., joined by White and O'Connor, JJ., dissenting); *id.* at 2555-2557 (Stevens, J., dissenting).

At the outset, the Court outlined the pertinent analysis:

We must first determine whether Johnson's burning of the flag constituted expressive conduct, permitting him to invoke the First Amendment in challenging his conviction. If his conduct was expressive, we next decide whether the State's regulation is related to the suppression of free expression. If the State's regulation is not related to expression, then the less stringent standard we announced in *United States v. O'Brien*, [391 U.S. 367, 377 (1968)], for regulations of noncommunicative conduct controls. If it is, then we are outside of *O'Brien's* test, and we must ask whether this interest justifies Johnson's conviction under a more demanding standard.

109 S. Ct. at 2538 (citations omitted). The Court found that "Johnson's burning of the flag was conduct sufficiently imbued with elements of communication to implicate the First Amendment," *id.* at 2540 (internal quotation marks and citation omitted); the Court thus turned to consider the interests advanced by the State of Texas to support its prohibition against flag burning.

The State first asserted an interest in preventing breaches of the peace. The Court found, however, that "[t]he only evidence offered by the State at trial to show the reaction to Johnson's actions was the testimony of several persons who had been seriously offended by the flag-burning," 109 S. Ct. at 2541, and thus concluded that the "State's position * * * amounts to a claim that an audience that takes serious offense at particular expression is necessarily likely to disturb the peace * * *," *ibid.* The Court rejected that sort of categorical presumption and held that, on the record presented, "the State's interest in maintaining order is not implicated." *Id.* at 2542.

Turning to the State's other asserted interest, "preserving the flag as a symbol of nationhood and national unity," 109 S. Ct. at 2542, the Court first concluded that that interest "is related to expression in the case of Johnson's burning of the flag," *ibid.* (citing *Spence v. Washington*, 418 U.S. 405 (1974)). The Court noted that the State appeared to be concerned "that such conduct will lead people to believe * * * that the flag does not stand for nationhood and national unity, but instead reflects other, less positive concepts * * *." 109 S. Ct. at 2542. Since those "concerns blossom only when a person's treatment of the flag communicates some message," the Court determined that the State's interest was related "to the suppression of free expression." *Ibid.* And the Court specifically found that Johnson "was prosecuted for his expression of dissatisfaction with the policies of this country, expression situated at the core of our First Amendment values." *Id.* at 2543. Consequently, the less stringent standard of *O'Brien* was inapplicable. Instead, the Court subjected the State's "asserted interest in preserving the special symbolic character of the flag to 'the most exacting scrutiny.'" 109 S. Ct. at 2543 (quoting *Boos v. Barry*, 485 U.S. 312, 321 (1988)).²

The Court concluded that that interest could not overcome "a bedrock principle underlying the First Amendment," namely, "that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." 109 S. Ct. at 2544. The Court rejected the proposition

² The Court noted that the record contained no suggestion that the defendant had stolen the flag he burned. As a result, the Court made clear that "nothing in [its] opinion should be taken to suggest that one is free to steal a flag so long as one uses it to communicate an idea." *Texas v. Johnson*, 109 S. Ct. at 2544 n.8.

that "a State may foster its own view of the flag by prohibiting expressive conduct related to it," *id.* at 2545, stating that it has "never before * * * held that the Government may ensure that a symbol be used to express only one view of that symbol or its referents," *id.* at 2546. And the Court refused to accord the flag any special constitutional protection, finding that there is "no indication—either in the text of the Constitution or in our cases interpreting it—that a special juridical category exists for the American flag alone." *Ibid.*

Chief Justice Rehnquist, joined by Justices White and O'Connor, dissented. 109 S. Ct. at 2548-2555. "For more than 200 years, the American flag has occupied a unique position as the symbol of our Nation, a uniqueness that justifies a governmental prohibition against flag burning in the way * * * Johnson did here." *Id.* at 2548. The Chief Justice pointed out that the "flag is not simply another 'idea' or 'point of view' competing for recognition in the marketplace of ideas." *Id.* at 2552. Accordingly, he could not agree that "the First Amendment invalidates the Act of Congress, and the laws of 48 of the 50 States, which make criminal the public burning of the flag." *Ibid.*

Analogizing Johnson's flag burning to the "fighting words" denied First Amendment protection in decisions such as *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), the Chief Justice stated that "it may equally well be said that the public burning of the American flag by Johnson was no essential part of any exposition of ideas, and at the same time it had a tendency to incite a breach of the peace," 109 S. Ct. at 2553. And he emphasized that the Texas statute "deprived Johnson of only one rather inarticulate symbolic form of protest—a form of protest that was profoundly offensive to many—and left him with a

full panoply of other symbols and every conceivable form of verbal expression to express his deep disapproval of national policy." In other words, "in no way can it be said that Texas is punishing him because his hearers—or any other group of people—were profoundly opposed to the message that he sought to convey." *Id.* at 2554.

Justice Stevens also dissented. 109 S. Ct. at 2555-2557. Given the "unique value" of the flag as a national symbol, Justice Stevens concluded that the government's interest in preserving that symbol certainly "supports a prohibition on the desecration of the American flag." *Id.* at 2557.

B. The Flag Protection Act of 1989

1. The Court's decision in *Texas v. Johnson, supra*, immediately raised concerns in the Executive and Legislative Branches over the vitality of 18 U.S.C. 700(a) (1988), the federal prohibition against desecration of the American flag. See note 1, *supra*. In *Johnson's* wake, Congress moved with considerable dispatch to protect the integrity of the American flag. See, e.g., 135 Cong. Rec. S7457 (daily ed. June 23, 1989) (statement of Sen. Biden). By mid-July 1989, a number of different proposals either to amend the federal statute or amend the Constitution had been introduced in both the Senate and the House of Representatives. See, e.g., S. Rep. No. 152, 101st Cong., 1st Sess. 6 (1989); H.R. Rep. No. 231, 101st Cong., 1st Sess. 2-3 (1989).

During the summer of 1989, the Judiciary Committees of both the House and Senate held extensive hearings with respect to the appropriate means of preserving a prohibition against flag burning. See *Statutory and Constitutional Responses to the Supreme Court Decision in Texas v. Johnson: Hearings Before the*

Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 101st Cong., 1st Sess. (1989) [*House Hearings*]; *Hearings on Measures to Protect the Physical Integrity of the American Flag: Hearings Before the Senate Comm. on the Judiciary*, 101st Cong., 1st Sess. (1989) [*Senate Hearings*]. Committee members heard widely divergent testimony from a variety of sources, including Members of Congress, concerned citizens, representatives of veterans' organizations, constitutional law scholars, prominent jurists and attorneys, and representatives from the Department of Justice.³ As a result of these hearings, each Committee reported out a bill to amend the current federal statute in light of *Texas v. Johnson*. The Committees chose not to propose constitutional amendments to overturn that decision.

2. The Senate bill, S. 1338, 101st Cong., 1st Sess. (1989), would have amended 18 U.S.C. 700(a) by deleting the element of "casts contempt upon" the flag, and instead would have made criminally liable "[w]hoever knowingly mutilates, defaces, burns, maintains on the floor or ground, or tramples upon any flag of the United States * * *." S. Rep. No. 152, *supra*, at 16. The Committee Report explained that the Senate bill's purpose

³ William Barr, Assistant Attorney General, Office of Legal Counsel, presented testimony on behalf of the Department of Justice. He explained the Department's position at length before both the House and Senate Judiciary Committees "that, in light of the expansive decision of the Court [in *Texas v. Johnson*], a statute simply would not suffice, and that the only way to ensure protection of the Flag is through a constitutional amendment." *House Hearings* 173; *Senate Hearings* 71; see *House Hearings* 166-199; *Senate Hearings* 64-99, 115-117. Attorney General Thornburgh reiterated that position in a letter submitted to the Senate Judiciary Committee. See *Senate Hearings* 118-119.

is to protect the physical integrity of the American flag * * *. The subject matter of this legislation is unique, as the American flag has an historic and intangible value unlike any other symbol. * * *

* * *

The flag has stood as the unique and unalloyed symbol of the Nation for more than 200 years. In seeking to protect its physical integrity, Congress is simply ratifying the unique status conferred upon the flag by virtue of its historic function as the emblem of this Nation.

S. Rep. No. 152, *supra*, at 2-3.

Furthermore, the report reflected the Committee's concerted effort to draft a bill consistent with the holding in *Texas v. Johnson*:

[U]nlike the law struck down in *Texas v. Johnson*—which was content-based—S. 1338 is content-neutral. Unlike the law struck down in *Texas v. Johnson*, whether one's treatment of the flag violates the amended Federal law would not depend on the likely communicative impact of the conduct. And unlike the law struck down in *Texas v. Johnson*, the amended Federal law is in fact "aimed at protecting the physical integrity of the flag in all circumstances."

S. Rep. No. 152, *supra*, at 10. The Committee recognized that its bill would face a constitutional challenge, but after weighing all the competing arguments, ultimately concluded that the bill "would pass constitutional muster." S. Rep. No. 152, *supra*, at 15.

The House bill, H.R. 2978, 101st Cong., 1st Sess. (1989)—which, with minor changes, became the Flag Protection Act of 1989—expanded on the proposed Senate bill by including a new definition of "flag of the United States," an exception for disposing of a worn or soiled flag, and a provision for expedited judicial review. See H.R. Rep. No. 231, *supra*, at 1-2,

13-14; pp. 2-3, *supra*.⁴ The Committee Report explained that the bill's purpose "is to protect the physical integrity of American flags." H.R. Rep. No. 231, *supra*, at 2.⁵ The Committee Report made clear that the bill, like its counterpart in the Senate, was carefully considered and drafted in light of *Texas v. Johnson*:

The bill responds to [that] decision * * * by amending the current Federal flag statute to make it content-neutral: that is, the amended statute focuses exclusively on the conduct of the actor, irrespective of any expressive message he or she might be intending to convey. The bill serves the national interest in protecting the physical integrity of all American flags in all circumstances. This interest is "unrelated to the suppression of free expression." *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

H.R. Rep. No. 231, *supra*, at 2.

The Committee was aware that the bill would likely face constitutional challenges, and thus sought to minimize "the delay and uncertainty that might result from extended litigation to determine the con-

⁴ Unlike its Senate counterpart, the House bill originally limited proscribed acts to "mutilates, defaces, burns, or tramples." See H.R. Rep. No. 231, *supra*, at 13. The House later accepted the Senate amendments and expanded the list of proscribed acts to include "physically defile[]" and "maintain[] on the floor or ground." See note 6, *infra*.

⁵ For that reason, the bill included an exception for disposal of a worn or soiled flag. As the Committee Report explained, "[w]hen a flag, through normal usage and the passage of time, has become worn or soiled, so that it is no longer a fitting emblem for display, the governmental interest in protecting its physical integrity no longer applies." H.R. Rep. No. 231, *supra*, at 9. The bill also narrowed the definition of a "flag of the United States" to avoid "infirmities of vagueness or overbreadth." H.R. Rep. No. 231, *supra*, at 12.

stitutionality of the statute." H.R. Rep. No. 231, *supra*, at 10. Accordingly, the bill included an express provision for expedited review "[i]n order to achieve prompt Supreme Court review of the constitutionality of the revised federal flag protection law." H.R. Rep. No. 231, *supra*, at 10. As the Committee explained, "[e]xpedited review insures not only that any question regarding the law's constitutionality is resolved quickly, but also that such review is conducted definitively by the Supreme Court." H.R. Rep. No. 231, *supra*, at 11.

3. On September 12, 1989, after a floor debate, the House of Representatives overwhelmingly passed H.R. 2978, as reported out of committee, by a vote of 380 to 38. See 135 Cong. Rec. H5500-H5514, H5562 (daily ed. Sept. 12, 1989). As a result, the Senate proceeded to consider that bill, as opposed to S. 1338. See 135 Cong. Rec. S12,571 (daily ed. Oct. 4, 1989). And on October 5, the Senate, after adding two proscribed acts to the bill,⁶ overwhelmingly passed H.R. 2978, by a vote of 91 to 9. See 135 Cong. Rec. S12,655 (daily ed. Oct. 5, 1989). The amended bill was therefore returned to the House, where, on October 12, it was passed by a wide margin (371 to 43). See 135 Cong. Rec. H6997 (daily ed. Oct. 12, 1989). The President allowed the bill to become law without his signature on October 28, 1989.⁷

⁶ The Senate added to H.R. 2978, as passed by the House, the proscribed acts of "physically defile[]" and "maintain[] on the floor or ground." See 135 Cong. Rec. S12,616-S12,619 (daily ed. Oct. 4, 1989); *id.* at S12,654-S12,655 (daily ed. Oct. 5, 1989).

⁷ In his formal statement to Congress, the President expressly endorsed Congress's aim of achieving "our mutual goal of protecting our Nation's greatest symbol * * * from desecration." Statement on the Flag Protection Act of 1989, 25 Weekly Comp. Pres. Doc. 1619 (Oct. 26, 1989). Neverthe-

C. Criminal Charges

1. On October 30, 1989, appellees, Shawn D. Eichman, David Gerald Blalock, and Scott W. Tyler, participated in a demonstration outside the Capitol, in Washington, D.C.⁸ That demonstration, occurring shortly after the Flag Protection Act of 1989 became effective, was hailed as a "CHALLENG[E]" to that statute. Attachment B, at 1, to U.S. Mem. in Opposition to Defendants' Mot. to Dismiss, *United States v. Eichman*, Cr. Nos. 89-419, 89-420, 89-421 (D.D.C. filed Jan. 12, 1990). As stated in a leaflet distributed at the rally:

less, he stated his "serious doubts that [the legislation] can withstand Supreme Court review," and made clear his position "that a constitutional amendment is the only way to ensure that our flag is protected from desecration." *Ibid.*

Despite the Executive Branch's stated position that a constitutional amendment was necessary to ensure that the flag would be protected in the wake of *Texas v. Johnson* (see note 3, *supra*), Congress chose to enact the statute. As the Court noted in *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981), "[t]he Congress is a coequal branch of government whose Members take the same oath we do to uphold the Constitution of the United States. * * * The customary deference accorded the judgments of Congress is certainly appropriate when, as here, Congress specifically considered the question of the Act's constitutionality." Under such circumstances, the Executive Branch enforced the statute and fulfilled its obligation to "take Care that the Laws be faithfully executed." U.S. Const. Art. II, § 3. And it is our position in this Court that the Court should affirm the constitutionality of the Flag Protection Act because of Congress's determination regarding the weight of the governmental interest at stake and because the proscribed conduct should not fall within the protection of the First Amendment.

⁸ Since the district court granted appellees' pretrial motion to dismiss the flag-burning charges, the pertinent facts are not disputed. See App., *infra*, 2a.

The battle lines are drawn. On one side stands the government and all those in favor of compulsory patriotism and enforced rever[e]nce to the flag. On the other side are all those[] opposed to this. And to all the oppressed we have this to say also. This flag means one thing to the powers that be and something else to all of us. Ever[y]thing bad this system has done and continues to do to people all over this world has been done under this flag. No law, no amendment will change it, cover it up, or stifle [sic] that truth. So to you we say, Express yourself! Burn this flag. It's quick, it's easy, it may not be the law, but it's the right thing to do.

Attachment B, *supra*, at 2; see App., *infra* 2a & n.1. During that demonstration, appellees each set an American flag on fire; those flags were incinerated. App., *infra*, 2a-3a; see Declaration of Edward L. Bailor (Jan. 1, 1990), attached to U.S. Mem. in Opposition to Defendant's Mot. to Dismiss, *supra*.

2. On October 31, 1989, the United States Attorney for the District of Columbia filed separate criminal informations charging each appellee with one count of knowingly burning a flag of the United States, in violation of 18 U.S.C. 700(a), as amended by the Flag Protection Act of 1989.⁹

⁹ Gregory Johnson, whose state criminal conviction culminated in *Texas v. Johnson*, had also participated in the demonstration at the Capitol. Johnson tried to burn an American flag, but that attempt was foiled when a police officer grabbed the flag out of Johnson's hands before he could set it ablaze. As a result, the United States Attorney declined to charge Johnson with violating the Flag Protection Act. See App., *infra*, 2a-3a & n.4; U.S. Mem. in Opposition to Defendants' Mot. to Dismiss at 2 n.3, *United States v. Eichman*, Cr. Nos. 89-419, 89-420, 89-421 (D.D.C. filed Jan. 12, 1990).

On December 5, 1989, appellees filed a joint motion to dismiss the criminal informations. Appellees contended that the Flag Protection Act of 1989, both on its face and as applied to their particular conduct, could not withstand the stringent standard of review mandated by *Texas v. Johnson*, and therefore violated the First Amendment.¹⁰

D. The District Court Decision

On March 5, 1990, the district court granted the motion to dismiss the informations, holding that the Flag Protection Act of 1989, as applied to appellees' conduct, violated the First Amendment. App., *infra*, 1a-18a.¹¹ As a threshold matter, the court concluded that appellees' "flag-burning constitutes expressive conduct of an overtly political nature and thus, implicates the First Amendment." App., *infra*, 10a.

Turning to the applicable standard of review, the district court determined that, under *Texas v. Johnson*, courts must apply strict scrutiny. Here, like the State's purpose in outlawing flag desecration in *Texas v. Johnson*, the "underlying purpose [of the Flag Protection Act] is to preserve the flag's symbolic value." App., *infra*, 11a. The court therefore concluded that

¹⁰ The United States Senate, through the Senate Legal Counsel, and the Speaker of the House of Representatives (representing the Democratic Leadership), through the General Counsel to the Clerk of the House, each filed a brief amicus curiae in opposition to appellees' motion.

¹¹ For that reason, the district court did not address appellees' claim that the statute was unconstitutional on its face. App., *infra*, 15a n.9.

The district court noted the recent decision in *United States v. Haggerty*, No. CR89-315-R (W.D. Wash. Feb. 21, 1990), striking down the Flag Protection Act as unconstitutional. The court found that decision "persuasive" and thus "willingly adopt[ed] much of [its] analysis." App., *infra*, 8a. See notes 13, 14, *infra*.

the Act "relates to the suppression of expression and should be scrutinized rigorously." App., *infra*, 11a.¹²

The Senate, as amicus curiae, contended that the governmental interest underlying the Flag Protection Act was not related to the suppression of expression, because Congress was seeking "to protect the physical integrity of the flag to preserve it as a universal symbol, embodying a diversity of views." App., *infra*, 12a. The district court rejected that argument, explaining that

[i]t makes no difference whether we describe [the flag] as a political symbol, or a symbol of the nation and nationhood, or the symbol under which a pluralistic society can strive to find common ground. For in protecting the flag for those who wish to waive [sic] it in support of these causes, but preventing the defendants from burning it in opposition, the government has created a regulation which cannot be justified without reference to the content of the defendants' message.

App., *infra*, 14a. In the court's view, the statute's "restriction, as applied to [appellees], is content-based and is subject to strict scrutiny." App., *infra*, 14a.

The House of Representatives, as amicus curiae, took a different approach, contending that the governmental interest underlying the Flag Protection Act was not related to the suppression of expression, because Congress sought "to protect the state's sovereign interest in the flag." App., *infra*, 14a. The district court, agreeing with the district court's analysis in *United States v. Haggerty*, No. CR89-315-R (W.D.

¹² The United States agreed with appellees that, under *Texas v. Johnson*, the Flag Protection Act was subject to strict scrutiny, as opposed to the more lenient *O'Brien* standard of review. App., *infra*, 11a.

Wash. Feb. 21, 1990) (see notes 13, 14, *infra*), dismissed that argument on two grounds: first, "the legislative history of the Act does not contain a single reference to the Congress' alleged sovereignty interest," App., *infra*, 15a, and second, "[t]he government's only possible interest in protecting the physical integrity of the flag as an incident of sovereignty is to prevent or punish acts of disrespect amounting to a rejection of United States sovereignty," App., *infra*, 15a (internal quotation marks and citation omitted).

Applying the stringent standard of review to the Flag Protection Act, the district court concluded that "the government's interest in protecting the physical integrity of the flag to preserve its symbolic value is [not] sufficiently compelling to justify convicting [appellees] for burning United States flags." App., *infra*, 15a. The court observed that in *Texas v. Johnson*, this Court stated that the government may not "foster its own views of the flag by prohibiting expressive conduct relating to it," App., *infra*, 16a (quoting *Texas v. Johnson*, 109 S. Ct. at 2545). And the court decided that *Texas v. Johnson* foreclosed the government's claim that Congress, on behalf of the Nation, has "a sufficiently compelling interest [in preserving the flag as a national symbol] to survive strict scrutiny." App., *infra*, 16a.

THE QUESTION IS SUBSTANTIAL

The district court has held an Act of Congress unconstitutional. In *Texas v. Johnson*, 109 S. Ct. 2533 (1989), a sharply divided Court held that a Texas statute outlawing desecration of venerated objects, as applied to the burning of an American flag, violated the First Amendment. In so holding, the Court stressed one infirmity of that state law provision—the law "reache[d] only those severe acts of physical

abuse of the flag carried out in a way likely to be offensive," *id.* at 2543, and emphasized the narrowness of the question it was deciding. See *id.* at 2544 n.8 ("Our inquiry is, of course, bounded by the particular facts of this case and by the statute under which Johnson was convicted.") By contrast, this case involves a federal statute—based on Congress's determination that the American flag is a unique national symbol deserving special protection—that prohibits persons from physically destroying that symbol, without reference to immediate audience reaction. In these respects, the case presents a question not squarely controlled by *Texas v. Johnson*. The question, which involves the constitutionality of a carefully drafted federal statute enacted by overwhelming votes of Congress, is substantial and should be set for plenary consideration by this Court.

1. The substantial nature of the constitutional question presented is made plain by Congress's express provision for expedited direct review in this Court. Flag Protection Act of 1989, Pub. L. No. 101-131, § 3, 103 Stat. 777 (to be codified at 18 U.S.C. 700(d)); pp. 2-3, *supra*. Section 700(d)(1), as amended, specifically provides that

[a]n appeal may be taken directly to the Supreme Court of the United States from any interlocutory or final judgment, decree or order issued by a United States district court ruling upon the constitutionality of [Section 700](a).

Congress further stressed the significance of resolving the statute's constitutionality by providing for *mandatory, expedited* appellate review in this Court over a ruling on that issue appealed to the Court:

The Supreme Court shall, if it has not previously ruled on the question, accept jurisdiction

over the appeal and advance on the docket and expedite to the greatest extent possible.

18 U.S.C. 700(d)(2) (as amended).

Congress was well aware that the Flag Protection Act would likely be challenged, and thus sought to minimize "the delay and uncertainty that might result from extended litigation * * *." H.R. Rep. No. 231, *supra*, at 10. Congress thus included these special jurisdictional provisions "[i]n order to achieve prompt Supreme Court review of the constitutionality of the revised federal flag protection law." H.R. Rep. No. 231, *supra*, at 10. As the House Judiciary Committee explained, "[e]xpeditious review insures not only that any question regarding the law's constitutionality is resolved quickly, but also that such review is conducted definitively by the Supreme Court." H.R. Rep. No. 231, *supra*, at 11.

In this case, a constitutional challenge to the Flag Protection Act, the district court has struck down that statute as unconstitutional as applied to appellees' burning of a flag of the United States.¹³ The Court "has not previously ruled on [that] question," 18 U.S.C. 700(d)(2) (as amended), and thus this case falls squarely within the Court's mandatory appellate jurisdiction created by the Flag Protection Act and merits the expedited review expressly provided by that statute.

¹³ On February 21, 1990, the United States District Court for the Western District of Washington held that the Flag Protection Act, as applied to a prosecution for burning an American flag, violated the First Amendment. *United States v. Haggerty*, No. CR89-315-R (W.D. Wash. Feb. 21, 1990). The United States filed a notice of appeal to this Court on February 23, 1990. The United States is today filing its jurisdictional statement in that case, requesting that the Court consider both cases simultaneously.

2. The United States does not dispute that appellees' flag burning constitutes expressive conduct. See, e.g., *Texas v. Johnson*, 109 S. Ct. at 2539-2540; *Spence v. Washington*, 418 U.S. 405, 409-410 (1974). Nor does the United States dispute that Congress enacted the Flag Protection Act in order to prohibit that narrow category of "symbolic speech"—that is precisely the purpose of this criminal provision. See App., *infra*, 10a-14a; pp. 8-12, *supra*. Nevertheless, those propositions should not doom the Act's constitutionality. In this case, the district court overvalued, for purposes of the First Amendment, the narrow category of expressive conduct at stake, and undervalued the compelling governmental interest—expressly identified by both the Congress and the President—that lies at the core of the statute: the preservation of the flag as the unique symbol of our Nation. When reviewed from the proper constitutional perspective, the Flag Protection Act fits within the bounds of the First Amendment.¹⁴

a. In a line of established precedent, the Court has "laid the foundation for the excision of [certain speech] from the realm of constitutionally protected expression." *New York v. Ferber*, 458 U.S. 747, 754 (1982). As summarized by the Court over a generation ago:

There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include

¹⁴ As noted (see note 13, *supra*), the United States is today filing its jurisdictional statement in *United States v. Haggerty*, No. CR89-315-R (W.D. Wash. Feb. 21, 1990), and is requesting that the Court consider both cases simultaneously. *Haggerty*, unlike the instant case, involves a prosecution for burning an American flag that was federal property.

the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.

Chaplinsky v. New Hampshire, 315 U.S. 568, 571-572 (1942) (footnotes omitted); see, e.g., *New York v. Ferber*, *supra* (child pornography); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (defamation); *Roth v. United States*, 354 U.S. 476 (1957) (obscenity). Those categories of expression, the Court has observed, "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Chaplinsky v. New Hampshire*, 315 U.S. at 572. In other words,

it is not rare that a content-based classification of speech has been accepted because it may be appropriately generalized that within the confines of a given classification, the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required.

New York v. Ferber, 458 U.S. at 763-764; see *Whitney v. California*, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring).

The Court has consistently recognized "the inherent dangers of undertaking to regulate any form of expression." *Miller v. California*, 413 U.S. 15, 23 (1973). Nevertheless, as an acknowledgment of shared values that are part of the Nation's heritage, the Court has refused to accord certain narrow, well-defined types of speech full First Amendment protection. As *Chaplinsky* and *Ferber* suggest, the protections of the First Amendment do not apply where

(1) the speech (or expressive conduct) is narrowly and precisely defined, (2) whatever value the expression may have to the speaker (or others) is outweighed by its demonstrable destructive effect on society as a whole or for particular overarching social policies, see, e.g., *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980) (false and misleading commercial speech); *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969) (employer's anti-union statements before representation election), and (3) the speaker has suitable alternative means to express (and others have means to receive) whatever protected expression may be part of the intended message, cf. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986) (restrictions on exhibition of "adult films").¹⁵

b. That constraining principle of the First Amendment applies to the conduct at issue—appellees' burning of a flag of the United States. Congress, which by design takes into account the interests of all citizens, see *The Federalist* No. 10, at 77 (J. Madison) (C. Rossiter ed. 1961), and the President, who is "elected by all the people," *Myers v. United States*, 272 U.S. 52, 123 (1926), have now spoken with one voice—the physical integrity of the flag of the United States,

¹⁵ To be sure, in both *Texas v. Johnson*, 109 S. Ct. at 2546 n.11, and *Spence v. Washington*, 418 U.S. at 411 n.4, the Court eschewed such a consideration of alternative means of expression, in the context of holding that the First Amendment protected symbolic speech involving the American flag. Those decisions, however, assumed that such expressive conduct merited full First Amendment protection. This case presents the Court with the opportunity to reconsider that premise, particularly where, as here, the people's elected representatives—the Congress and the President—have made the considered decision that the physical destruction of the flag is—uniquely—anathema to the Nation's values.

as the unique symbol of the Nation, merits protection not accorded other national emblems.

As the Senate Judiciary Committee explained:

The flag has stood as the unique and unalloyed symbol of the Nation for more than 200 years. In seeking to protect its physical integrity, Congress is simply ratifying the unique status conferred upon the flag by virtue of its historic function as the emblem of this Nation.

S. Rep. No. 152, *supra*, at 3. The House Judiciary Committee echoed those findings:

[The prohibition against flag burning] recognizes the diverse and deeply held feelings of the vast majority of citizens for the flag, and reflects the government's power to honor those sentiments through the protection of a venerated object * * * .

H.R. Rep. No. 231, *supra*, at 9. And the President expressly endorsed Congress's aim of achieving "our mutual goal of protecting our Nation's greatest symbol * * * from desecration." Statement on the Flag Protection Act of 1989, 25 Weekly Comp. Pres. Doc. 1619 (Oct. 26, 1989).

In *Spence v. Washington*, 418 U.S. at 413, the Court eloquently foreshadowed the motivating force behind the Flag Protection Act:

For the great majority of us, the flag is a symbol of patriotism, of pride in the history of our country, and of the service, sacrifice, and valor of the millions of Americans who in peace and war have joined together to build and to defend a Nation in which self-government and personal liberty endure. It evidences both the unity and diversity which are America.

And that representative consensus identifies the substantial potential harm posed by wanton physical

destruction of the American flag—the weakening of the shared values that bind our national community.¹³

As Justice Stevens remarked:

[S]anctioning the public desecration of the flag will tarnish its value—both to those who cherish the ideas for which it waves and for those who desire to don the robes of martyrdom by burning it.

Texas v. Johnson, 109 S. Ct. at 2556 (dissenting opinion).

For these reasons, the Court should treat the conduct at issue—physical destruction of a flag of the United States—as it has such other narrowly defined categories of expressive conduct that have not merited full protection under the First Amendment. Flag burning, like “fighting words,” obscene materials, and defamatory statements,¹⁷ presents substantial “evils” incompatible with “the very purpose for which organized governments are instituted,” *Texas v. Johnson*, 109 S. Ct. at 2555 (Rehnquist, C.J., dissenting). And, such conduct (at most) involves “expressive interests” which, given the availability of other means of

¹⁶ Indeed, Congress originally enacted the predecessor statute in 1968 based on its finding that “[p]ublic burning, destruction, and dishonor of the national emblem inflicts an injury on the entire Nation.” S. Rep. No. 1287, 90th Cong., 1st Sess. [sic; 2d] 3 (1968).

¹⁷ Such statements fit literally within the text of the First Amendment, yet they have been deemed unworthy of protection and thus not to constitute “speech” for purposes of First Amendment analysis. That is so even though such expressions may reflect the most deeply held views on subjects of interest to the polity (and thus lying at the core of those values protected by the First Amendment).

expression, are “overwhelmingly outweigh[ed]” by the identified harm. *New York v. Ferber*, 458 U.S. at 763-764. Considered within this analytical framework, the Flag Protection Act, contrary to the district court’s reasoning, is consistent with the First Amendment.

c. Although the act of burning an American flag, in our view, falls outside the scope of protected speech under the First Amendment, a governmental prohibition against such conduct must still withstand judicial scrutiny. As both this case, see App., *infra*, 2a-3a, and *Texas v. Johnson*, 109 S. Ct. at 2536-2540, vividly show, the proscribed conduct will likely be accompanied by otherwise fully protected expression. For that reason, a governmental measure designed to outlaw destruction of an American flag must be limited to achieve that particular objective and should be scrutinized to ensure that it does not unnecessarily proscribe otherwise protected expression under the First Amendment. See, e.g., *Street v. New York*, 394 U.S. 576 (1969). The Flag Protection Act, drafted by Congress to preclude a circumscribed type of conduct—physically damaging a flag of the United States—ensures that only such unprotected expression will be prosecuted.

d. Finally, we recognize that our submission here is in tension with the Court’s recent decision in *Texas v. Johnson*, *supra*. Nevertheless, the Court there had no occasion to address, much less weigh for constitutional purposes, the sort of express *Congressional* determination regarding the need to protect the integrity of the American flag that led to the enactment of the Flag Protection Act at issue in this case. And to the extent that the *Johnson* Court accorded flag

burning, as expressive conduct, full First Amendment protections, the United States respectfully suggests that this case—together with *United States v. Haggerty*, No. CR89-315-R (W.D. Wash. Feb. 21, 1990) (see notes 13, 14, *supra*)—present an appropriate occasion for the Court to consider more fully that analysis.

3. As noted, the Flag Protection Act specifies that an appeal to this Court may be taken “from any interlocutory or final judgment, decree, or order issued by a United States district court ruling upon the constitutionality” of the Act, 18 U.S.C. 700(d)(1) (as amended), and that “[t]he Supreme Court shall * * * accept jurisdiction over the appeal and advance on the docket and expedite to the greatest extent possible,” 18 U.S.C. 700(d)(2) (as amended). In view of those express Congressional directives, the United States has endeavored to expedite the matter thus far, and we stand ready to adhere to an expedited briefing schedule. See, *e.g.*, *Dames & Moore v. Regan*, 453 U.S. 654 (1981).¹⁸

¹⁸ In *Dames & Moore*, the Court granted certiorari before judgment on June 11, 1981, and ordered the parties to exchange and file opening briefs by June 19, 1981, and any reply briefs by June 23, 1981. The case was argued on June 24, 1981, and decided by July 2, 1981. This occurred in a case in which Congress had not even mandated expedited review, let alone expedited review “to the greatest extent possible.”

CONCLUSION

Probable jurisdiction should be noted and consideration of the appeal expedited, simultaneously with the appeal filed in *United States v. Haggerty*, No. CR89-315-R (W.D. Wash. Feb. 21, 1990).

Respectfully submitted.

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MARCH 1990

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal Nos. 89-0419, -0420, -0421

UNITED STATES OF AMERICA

v.

SHAWN D. EICHMAN, DAVID GERALD BLALOCK,
SCOTT W. TYLER

[Filed: Mar. 5, 1990]

OPINION

This matter is before the Court on the defendants' Motion to Dismiss the informations filed against Shawn D. Eichman, David Blalock and Scott W. Tyler based on the alleged unconstitutionality of the Flag Protection Act of 1989 under which the defendants were charged. Upon consideration of the defendants' motion, the government's opposition, memoranda filed by the United States Senate and the Speaker and Leadership Group of the House as *amici curiae* opposing the defendants' motion, evidence presented at the February 22, 1990 hearing on the motion, and for the reasons set forth below, the Court finds the Flag Protection Act of 1989 to be unconstitutional and, therefore, grants the defendants' motion to dismiss.

I. Facts

A. Defendants' Actions

Although the defendants refused to enter a stipulated statement of facts with the government, the facts of this matter are largely undisputed. Shortly before noon on October 30, 1989, defendants Shawn Eichman, David Blalock and Scott Tyler set ablaze several United States Flags on the east steps of the United States Capitol during a political demonstration. The defendants, together with one Gregory Lee Johnson, were protesting various aspects of United States domestic and foreign policy.¹ But they were

¹ Defendants' companions present during the flag burning distributed and read aloud a two-page statement to the small crowd of media representatives and onlookers which gathered on the Capitol steps. See Government's Memorandum in Opposition to Defendants' Motion to Dismiss ("Government's Opposition"), Attachment B. The statement, signed by the defendants, challenged the government to test the constitutionality of the Flag Protection Act by arresting the defendants. It also decried "compulsory patriotism and enforced reverence to the flag." It listed "increasing racism, assaults on women[s] rights, calls for an enforced, oppressive moral code, censorship, intervention in other countries and overall escalating attacks on the people" as some of the varied reasons the defendants promoted flag burning.

As addenda to their motion to dismiss, the defendants have submitted sworn declarations in which they offer *post facto* explanations for burning the flag. See Defendants' Motion to Dismiss ("Defendants' Motion") Exhibits 2-4. Shawn Eichman burned the flag to protest the United States' oppression of women and intervention abroad. Defendants' Motion, Exhibit 4. David Blalock, a Vietnam veteran, burned the flag in opposition to American intervention abroad. Defendants' Motion, Exhibit 2. Scott Tyler, in burning the flag, expressed his solidarity with all people oppressed by the United States. He also burned the flag in protest of the clause in the Act making

united in their objection to the newly enacted Flag Protection Act of 1989.²

The defendants and Mr. Johnson were arrested for violating the Flag Protection Act of 1989, disorderly conduct and demonstrating without a permit.³ The United States Attorney for the District of Columbia later charged the three defendants with violation of the Act. Mr. Johnson, whose flag did not ignite, was not charged.⁴

B. The Flag Protection Act of 1989

The Flag Protection Act of 1989 (hereinafter "Act" or "Flag Protection Act") amends 18 U.S.C. Section 700. The Act provides that "(w)hoever

it a crime to "maintain (the flag) on the floor or ground", which he claims the Congress added in response to his controversial art exhibit, "What is the Proper Way to Display the U.S. Flag?", displayed by the School of Art Institute of Chicago in February 1989. Defendants' Motion, Exhibit 3. Gregory Lee Johnson also submitted a statement explaining that his attempt to burn the flag expressed his unity with oppressed people throughout the world. Defendants' Motion, Exhibit 5.

² The Flag Protection Act of 1989, Pub. L. No. 101-131, 1989 U.S. Code Cong. and Admin. News (103 Stat.) 777 (to be codified at 18 U.S.C. Section 700).

³ Corporation Counsel for the District of Columbia declined to prosecute any of the four individuals arrested for disorderly conduct, 22 D.C. Code Section 1121, or demonstrating without a permit, Section 153 of the Traffic and Motor Vehicle Regulations for the United States Capital [*sic*] Grounds.

⁴ Although the defendants have suggested that the government refused to charge Mr. Johnson for strategic reasons, the United States explained both in its papers and in oral argument that it could not prosecute Mr. Johnson without sufficient evidence that he, in fact, had violated the Act.

knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon any flag of the United States shall be fined under this title or imprisoned for not more than one year, or both." Section 2(a)(1), [amending 18 U.S.C. Section 700(a)(1)]. However, the Act "does not prohibit any conduct consisting of the disposal of a flag when it has become worn or soiled." Section 2(a)(2), [amending 18 U.S.C. Section 700(a)(2)]. The statute defines "flag of the United States" as "any flag of the United States, or any part thereof, made of any substance, of any size, in a form that is commonly displayed." Section 2(b), [amending 18 U.S.C. Section 700(b)].

C. *Texas v. Johnson*

Legislative history reveals that the Flag Protection Act was a congressional response to the Supreme Court's recent opinion in *Texas v. Johnson*, 491 U.S. —, 105 L.Ed.2d 342, 109 S.Ct. 2533 (1989). H.R. Rep. No. 101-123, 101st Cong., 1st Sess. 2 (1989); S. Rep. No. 101-152, 101st Cong., 1st Sess. 4 (1989). See generally, *Hearings on Measures to Protect the Physical Integrity of the American Flag*, Hearings Before the Comm. on the Judiciary, United States Senate, 101st Cong., 1st Sess. 1-754; *Statutory and Constitutional Responses to the Supreme Court Decision in Texas v. Johnson*, Hearings Before the Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary, House of Representatives, 101st Cong., 1st Sess. 1-572 (1989). In *Johnson*, the United States Supreme Court overturned the conviction of Gregory Lee Johnson⁵ under a Texas statute

⁵ This is the same Gregory Lee Johnson whom the government declined to charge in the present matter.

which prohibited the desecration of venerated objects, including the United States Flag. The statute under which Mr. Johnson was charged made it a crime in Texas to "deface, damage or otherwise physically mistreat in a way the actor knows will seriously offend one or more persons likely to observe or discover his actions." *Johnson*, 109 S. Ct. at 2537, n.1. The winds of fortune blowing in the opposite direction, Mr. Johnson managed to ignite and burn a United States flag on the steps of City Hall in Dallas, Texas during the Republican National Convention. The flag-burning was the culmination of a demonstration against Reagan administration policies.

The Supreme Court declared the Texas statute unconstitutional as applied to Mr. Johnson. As a threshold matter, the Court determined that Mr. Johnson, in burning the United States flag, had engaged in expressive conduct protected by the First Amendment. Justice Brennan, writing for the majority, declared eloquently that the flag is "pregnant with expressive conduct". *Id.* at 2540. Mr. Johnson's decision to burn this potent symbol on the eve of Ronald Reagan's renomination, at the doorsteps of the city hosting the Republican Convention was, the Court concluded, "sufficiently imbued with the elements of communication," to implicate the First Amendment." *Johnson*, at 2540, quoting *Spence v. Washington*, 418 U.S. 405, 409 (1974).

The Court next considered what standard to apply in scrutinizing Texas' prohibition of this protected conduct. The Court held that if the interests advanced by Texas were related to the suppression of expression, then the more lenient test of expressive conduct set forth in *United States v. O'Brien*, 391 U.S. 367 (1968) would not apply. Rather than establishing only an important or substantial government

interest in regulating the nonexpressive element of the conduct under the *O'Brien* test, the state would have to show a compelling interest to justify the regulation.

The Court found that Texas' asserted interest in preventing breaches of the peace was not implicated on the record because there was no evidence that Johnson's burning of the flag actually caused a breach of the peace. *Johnson*, 109 S.Ct. at 2542. However, the Court held that the state's asserted interest in preserving the flag as a symbol of nationhood and national unity was related to the suppression of expression. *Id.* Relying on its prior holding in *Spence*, the Court concluded that a state interest in preserving the flag's symbolic value "blossom(ed) only when a person's treatment of the flag communicates some message", regardless of whether the conduct prohibited was affixing a peace symbol to the flag or flag-burning. *Id.*

Finally, the Court held that Texas' interest in preserving the symbolic value of the flag was not sufficiently compelling to justify the conviction of the defendant. *Id.* at 2542-2548. In attempting to prohibit only those flag-burnings which caused serious offense, the Court found Texas had violated "a bedrock principle underlying the First Amendment . . . that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Id.* at 2544. The Court rejected Texas' attempt to "foster its own view of the flag by prohibiting expressive conduct relating to it." *Id.* at 2545. For, as the Court stated, to allow flag-burning only when it does not endanger the flag's symbolic role, would be to permit the Government to "prescribe what shall be orthodox" in violation of the First Amendment. *Id.* at 2546. The Court also re-

fused to accord the flag any special constitutional significance, finding "no indication—either in the text of the Constitution or in our cases interpreting it—that a separate juridical category exists for the American Flag alone." *Id.*

II. Discussion

The defendants assert that *Johnson* controls the disposition of this case and that the same result must follow here. They also challenge the constitutionality of the Act on its face, claiming that it is impermissibly viewpoint-based, vague and overbroad. They argue that each of these ground requires dismissal of the charges against them.

In oral argument, the defendants have pointed the Court to *United States v. Haggerty*, Criminal No. 89-315R (W.D.W. February 21, 1989 [*sic*; 1990]) decided recently by the United States District Court for the Western District of Washington at Seattle, in support of their position. In *Haggerty*, Judge Rothstein held that the defendants, who burned a United States flag in front of a Seattle post office only minutes after the Flag Protection Act of 1989 took effect, could not be prosecuted for flag-burning because the Act violates the First Amendment. Judge Rothstein concluded that under the *Johnson* analysis, the government's asserted interest in enacting the Flag Protection Act, namely, to protect the symbolic value of the flag, "cannot survive the exacting scrutiny which [the] Court must apply." *Haggerty*, Criminal No. 89-315R, slip op. at 12.

The defendants urge this Court to follow *Haggerty*'s lead and strike down the Act. Of the litigants opposing the defendants' motion,⁶ only the Senate has

⁶ Like the *Haggerty* court, this Court has received memoranda in opposition to the defendants' motion to dismiss from

commented on the *Haggerty* opinion. At the hearing on the defendants' motion to dismiss, Senate counsel expressed concern over what she termed mischaracterizations of the Senate's argument, mischaracterizations which she felt were crucial to the Court's decision. Counsel for the Senate argued that *Haggerty* misconstrued *Johnson* in holding that the flag could never be protected because the governmental interest in flag protection would be related necessarily to the suppression of expression.

The Court finds Judge Rothstein's reasoning eloquent and persuasive and willingly adopts much of her analysis. In proceeding with its own analysis, the Court seeks primarily to add weight the logic of the argument and to address concerns voiced by the Senate at the hearing on the motion to dismiss.

A. Defendants' Flag-burning Constitutes Expressive Conduct Under the First Amendment

The First Amendment of the United States Constitution protects against the infringement of speech by the Government. The protection is not limited to the written or spoken word. A person also may express his thoughts through conduct in which he purposefully engages. The Supreme Court has recognized that such symbolic speech or expressive conduct lies within the confines of the First Amendment's protection of free speech. *See, e.g., Brown v. Louisiana*, 383

three sources. The Department of Justice, as prosecutor, speaks for the executive branch, and their position mirrors the congressional testimony of William P. Barr, Assistant Attorney General for the Office of Legal Counsel. The Speaker and Leadership Group (consisting of the Majority Leader and the Majority Whip) of the House of Representatives and the Senate appear as amici curiae.

U.S. 131 (1966) (silent sit-in by blacks demonstrating against a segregated library); *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969) (students wearing armbands to protect American military involvement in Vietnam); *Schacht v. United States*, 398 U.S. 58 (1970) (the wearing of United States military uniforms during a dramatic performance to criticize American intervention in Vietnam).

Moreover, the Court has determined that the American flag is "pregnant with expressive conduct", and many activities relating to it are shielded by the First Amendment. *Johnson*, 109 S.Ct. at 2540. *See e.g., Spence*, 418 U.S. at 409-410 (affixing a peace symbol to the flag); *Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943) (refusal to salute the flag); *Stromberg v. California*, 283 U.S. 359 (1931) (displaying a red flag). *See also, Smith v. Gougen*, 415 U.S. 566 (1974) (White, J., concurring in judgment) (wearing flag patch on seat of trousers is expressive speech). Most significant to the present case, of course, is the Supreme Court's determination in *Johnson* that flag-burning is within the ambit of First Amendment protection.

Nevertheless, the Court cannot assume axiomatically that a particular defendant's conduct is "sufficiently imbued with the elements of communication to fall within the scope of the First . . . Amendment[]", *Spence*, 418 U.S. at 409, even where the defendant engages in flag-burning. A person may burn a flag because he is cold or because he wishes to dispose of it, without intending thereby to convey an idea or opinion. The Court must examine whether the context of the defendants' actions "reveal an intent to convey a particularized message," and a "likelihood

... that the message [will] be understood by those who view[] it." *Id.* at 411.

The Court finds that defendants Eichman, Blalock and Tyler intended to communicate messages of dissent and succeeded dramatically in their attempt. The defendants burned the flags in challenge of the Flag Protection Act which had taken effect only two days earlier. They came from their homes in other states to carry out their challenge at the doors of the United States Congress which had enacted the statute. While the flags burned, companions passed out leaflets expressing the defendants' objections to the new law and other policies of the Federal Government. Given these circumstances, this Court, like the *Johnson* and *Haggerty* Courts, concludes that the defendants' flag-burning constitutes expressive conduct of an overtly political nature and thus, implicates the First Amendment.

B. Governmental Interest in the Flag Protection Act

Government restrictions on expressive conduct generally are not subject to the exacting scrutiny which restrictions on pure speech are subject to under the First Amendment. This is because expressive conduct contains both speech and non-speech elements. The Supreme Court held in *United States v. O'Brien* that the government need show only a sufficiently important interest in regulating non-speech elements of expressive conduct to justify incidental limitations on otherwise protected speech. *O'Brien*, 391 U.S. at 376.

However, the government cannot regulate the non-speech elements of expressive conduct where its true aim is to suppress the speech elements of the actor's

conduct. The Court, therefore, must focus on the government's interest in regulating expressive conduct to ferret out restrictions designed to suppress protected forms of expression. If the government's interest is related to the suppression of expression, then the more lenient standard of *O'Brien* does not apply. *Johnson*, 109 S.Ct. at 2542.

In *Johnson*, the Supreme Court applied strict scrutiny to the Texas statute because the state's asserted interest—preserving the flag as a symbol of nationhood and national unity—was related to the suppression of expression. *Johnson*, 109 S.Ct. at 2542-2543. A crucial question in this litigation is whether the government's asserted interest in enacting the Flag Protection Act is so similar to Texas' asserted interest in *Johnson*, that strict scrutiny also applies here.

The defendants argue that strict scrutiny does apply. The Department of Justice agrees. However, for separate reasons, the Senate and House both contend that the Court should employ the less rigorous balancing approach of *O'Brien*.

This Court concludes that any prosecution of the defendants[] under the Flag Protection Act should be reviewed with the strictest scrutiny. Even though the Act purports to protect the physical integrity of the flag, the Department of Justice, the Senate and the House all agree that its underlying purpose is to preserve the flag's symbolic value. Texas also sought to protect the flag as a symbol of the Nation. Thus, the Flag Protection Act, like the Texas anti-desecration statute, relates to the suppression of expression and should be scrutinized rigorously.

1. The United States Senate

The Senate attempts to distinguish *Johnson* by arguing that unlike Texas, the government is not

seeking to "foster its own view of the flag by prohibiting expressive conduct relating to it." *Johnson*, 109 S.Ct. at 2545. Rather, the government seeks to protect the physical integrity of the flag to preserve it as a universal symbol, embodying a diversity of views. According to the Senate, the government affirmatively seeks to protect the flag for everyone's use and no one's destruction. Record, at 44. *See also* Record, at 43 ("Congress has sought to regulate the manner in which everyone uses the flag so that the symbol remains undiluted as a means of communication for everyone.").

If the Senate's argument is that the government has "an interest simply in maintaining the flag as a symbol of *something*," then, "it [is] difficult to see how that interest is endangered by highly symbolic conduct such as [the defendants']." *Johnson*, 109 S.Ct. 2544. Thus, the Court would conclude that the government's interest is simply not implicated on these facts. *Id.* at 2538. However, the government's true purpose appears more restricted;⁷ the government seeks to preserve the flag as a symbol only for

⁷ The Senate argues that the government pursues the following affirmative objectives in protecting the flag as a symbol:

to assure that the symbolism of the flag will be of service to the preservation of the nation, as in times of war; to be sensitive to the emotions of families who receive the funeral flags of loved ones; to provide an overarching symbol under which a pluralistic society can strive to find common ground; to serve notice that anyone may speak his or her mind under the protection of the flag; and others.

Memorandum of the United States Senate as Amicus Curiae in Support of Constitutionality of the Flag Protection Act of 1989, at 33.

those who would not damage or destroy it. In doing so, the government impermissibly shuts out those viewpoints which are expressed through the symbolic destruction of the flag.

Nevertheless, the Senate asserts that the Act is content-neutral because it prohibits anyone from damaging the flag in specified ways regardless of the actor's intent to convey a message or the communicative impact of the conduct. Because the Act is content-neutral, the Senate contends, strict scrutiny does not apply.

A regulation is not content-neutral, however, merely because on the face of the statute the same rules apply to everyone. In some cases a statute may indicate clearly on its face that its application depends upon the content of the speaker's message. In others, the restriction appears facially neutral, yet, its purpose reveals an intent to suppress a particular viewpoint or range of viewpoints. The test of content-neutrality is whether the regulation is justified without reference to the content of the regulated speech. *Boos v. Barry*, 485 U.S. 312, 320 (1988)⁸ Thus, as Judge Rothstein concludes in *Haggerty*, it is the reason for legislation, not its scope which determines content-neutrality. *Haggerty*, slip. op. at 10.

⁸ The Senate correctly points out that this conclusion was not supported by the majority of the Court in *Boos*. Justices Brennan and Marshall objected to the extension of the Court's "secondary effects analysis in *Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986), to other types of speech, particularly political speech. *Boos*, 485 U.S. at 334-335 (Brennan, J., concurring in part and in the judgment). Chief Justice Rehnquist and Justices White and Blackmun dissented with the majority's conclusions on all First Amendment grounds. *Boos*, 485 U.S. at 338-339 (Rehnquist, C.J., concurring in part and

The reason Congress enacted the Flag Protection Act was to protect the flag as a symbol. It makes no difference whether we describe it as a political symbol, or a symbol of the nation and nationhood, or the symbol under which a pluralistic society can strive to find common ground. For in protecting the flag for those who wish to waive [*sic*] it in support of these causes, but preventing the defendants from burning it in opposition, the government has created a regulation which cannot be justified without reference to the content of the defendants' message. Therefore, the restriction, as applied to the defendants, is content-based and is subject to strict scrutiny.

2. United States House of Representatives

In addition to adopting the arguments of the Senate, the House advances a separate governmental interest in justification of the Flag Protection Act. The House claims that the government seeks to protect the state's sovereign interest in the flag. The House discusses at length case law and historical records illustrating the state's protection of the flag as an incident of sovereignty. The House argues that "[w]hile the *public* may generally look to the flag for

dissenting in part). Justice Kennedy did not take part in considering or deciding the case.

However, the Court finds the Flag Protection Act is content-based even under the bright-line rule set forth by Justice Brennan. The application of the Flag Protection Act turns on whether the speaker seeks to show disrespect for the flag. If the speaker's message is "I do not support the flag, and all it commonly symbolizes," he is prevented from symbolically acting out that message. Supporters of the flag, however, are not prohibited from waving the flag, or flying it in any weather, or by other symbolic acts commonly employed to show the speaker's respect.

symbolizing values such as patriotism . . . the *government* has in the flag an incident of sovereignty, with definite concrete legal significance." Motion of the Speaker and Leadership Group of the U.S. House of Representatives in Opposition to Defendants' Motion to Dismiss, at 3. This interest, the House maintains, is content-neutral, and therefore, strict scrutiny does not apply.

United States v. Haggerty points out the two central flaws in the House's argument. First, the legislative history of the Act does not contain a single reference to the Congress' alleged sovereignty interest, although it is replete with statements on the importance of protecting the flag as a symbol. *Haggerty*, slip. op. at 13. Second, "[t]he government's only possible interest in protecting the physical integrity of the flag as an incident of sovereignty is to prevent or punish acts of disrespect amounting to a rejection of United States sovereignty," therefore, "that interest relates to the suppression of expression and is subject to strict scrutiny." *Id.*

C. Strict Scrutiny of the Government Interest

The Court turns now to the question of whether the government's interest in protecting the physical integrity of the flag to preserve its symbolic value is sufficiently compelling to justify convicting the defendants for burning United States flags. The Court concludes that, under *Johnson*, it is not.⁹

The Supreme Court clearly held in *Johnson* that a governmental interest in protecting the flag as a

⁹ Because the Court has determined that the Flag Protection Act of 1989 is unconstitutional as applied to the defendants in this case, it need not consider the defendants' facial challenges of the Act.

symbol did not justify criminally punishing a person for burning a flag as a means of political protest. *Johnson*, 109 S.Ct. at 2547. This is not to say that the government cannot promote its interests in preserving the symbolic nature of the flag to its citizenry. The First Amendment presents no bar to gentle persuasion. But the government may not "foster its own views of the flag by prohibiting expressive conduct relating to it." *Johnson*, 109 S.Ct. at 2545.

The Department of Justice takes the position that the government's interest is sufficiently compelling to survive strict scrutiny. The Department of Justice recognizes that this Court has no authority to overrule *Johnson*. However, the Department of Justice suggests that the government's interests are more compelling than Texas' because both the Congress and the Executive have pronounced the protection of the flag as a necessary policy goal. The Department points to the Act itself and presidential support for a constitutional amendment as evidence of the compelling nature of the government's interest.

However compelling the government may see its interests, they cannot justify restrictions on speech which shake the very cornerstone of the First Amendment. As the Court stated in *Johnson*, "[i]f there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive." The government seeks to deny the defendants the expressive use of the flag because their use will not promote the flag's symbolic value. It denies their expression because the ideas they wish to convey are offensive to the role of the flag as a symbol. The Supreme Court has held in *Street v. New York*, 394 U.S. 576, 592 (1969), that a state may not prohibit a person from

expressing verbally her opinions about the flag merely because they may shock the sensibilities of those who hear them. "Expressing contempt for the flag by burning it [may be] more emotionally shocking than speaking contemptuous words",¹⁰ but both are shielded by the First Amendment.

III. Conclusion

As so many of its predecessors who have grappled with this issue, the Court feels unable to conclude without reflecting upon the gravity of its decision.

The First Amendment protects the expression of some repugnant viewpoints. Uniformed Nazis displaying swastikas are allowed to march in towns where Holocaust survivors dwell. *Collins v. Smith*, 578 F.2d 1197 (7th Cir.), cert. denied, 439 U.S. 916 (1978). Ku Klux Klan members can burn crosses while expressing their racial and religious bigotry. *Brandenburg v. Ohio*, 395 U.S. 444 (1969). To many perhaps, there are no more offensive viewpoints than those expressed by the burning of the American flag. The Court is acutely aware that those who burn our flag mock and trivialize this solemn symbol of our Nation's soul. Yet, "[i]t is poignant but fundamental that the flag protects those who hold it in contempt." *Johnson*, 109 S.Ct. 2533, 2548 (Kennedy, J. concurring).

Justice Jackson foreshadowed the outcome of this case when he wrote in *Virginia Board of Education v. Barnette*, 319 U.S. at 642, "freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its

¹⁰ Bogdan, *Congressional Prohibition of Contemptuous Flag Burning Suppresses Constitutionally Protected Free Speech*, 40 Wash. & Lee L. Rev. 1541, 1551 (1983).

substance is the right to differ as to things that touch the heart of the existing order."

The right to dissent is sometimes an albatross which burdens our society with its offensive sounds. Yet, political dissent lies at the heart of the First Amendment's protection. It is worth bearing in mind that the First Amendment to the Bill of Rights would not have been needed if the persons who exercise their right of free expression by word and action were all pleasing, loveable persons with whom the rest of the citizens agreed. The First Amendment, of course, makes no invidious exceptions. It provides protection for everyone, including the defendants.

The law under which these three defendants have been prosecuted is unconstitutional. Accordingly, the cases against them are dismissed with prejudice. An appropriate order is attached.

/s/ June L. Green
JUNE L. GREEN
 U.S. District Judge

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Criminal Nos. 89-0419, -0420, -0421

UNITED STATES OF AMERICA,

v.

SHAWN D. EICHMAN, DAVID GERALD BLALOCK,
SCOTT W. TYLER

[Filed: Mar. 5, 1990]

ORDER

Upon consideration of defendants' Motion to Dismiss the Informations Filed Against Shawn Eichman, David Blalock and Scott Tyler; the papers submitted in support of and in opposition to the motion; the oral arguments of counsel; the entire record herein; and for the reasons set forth in the accompanying opinion, it is by the Court this 5th day of March 1990,

ORDERED that the defendants' motion to dismiss is granted.

/s/ June L. Green
JUNE L. GREEN
 U.S. District Judge

20a

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal Nos. 89-0419, -0420, -0421 (JLG)

UNITED STATES OF AMERICA, PLAINTIFF

v.

SHAWN D. EICHMAN, DAVID GERALD BLALOCK,
AND SCOTT W. TYLER, DEFENDANTS

[Filed: Mar. 6, 1990]

NOTICE OF APPEAL

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that the plaintiff, the United States of America, hereby appeals to the Supreme Court of the United States from the orders of this Court entered on March 5, 1990, dismissing the criminal informations filed in the above-captioned matter.

21a

This appeal is taken under Pub. L. No. 101-131, § 3, 103 Stat. 777 (1989) (to be codified at 18 U.S.C. 700(d)).

DATED this 6th day of March, 1990.

Respectfully submitted,

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OPPOSITION

BRIEF

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

UNITED STATES OF AMERICA,

Appellant,

—v.—

SHAWN E. EICHMAN, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. 89-1434

UNITED STATES OF AMERICA,

Appellant,

—v.—

MARK JOHN HAGGERTY, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

**MEMORANDUM OF APPELLEES IN RESPONSE
TO JURISDICTIONAL STATEMENTS**

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

No. 89-1433

UNITED STATES OF AMERICA, APPELLANT

v.

SHAWN E. EICHMAN, ET AL.,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. 89-1434

UNITED STATES OF AMERICA, APPELLANT

v.

MARK JOHN HAGGERTY, ET AL.,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

MEMORANDUM OF APPELLEES IN RESPONSE
TO JURISDICTIONAL STATEMENTS

I. INTRODUCTION

On March 13, 1990, the Solicitor General, on behalf of the United States, filed jurisdictional statements appealing from the decision and order of the United States District Court for the District of Washington of February 21, 1990 in United States v. Haggerty, and from the decision and order of the United States District Court for the District of Columbia of March 5, 1990 in United States v. Eichman. Appellees, defendants below, agree that this Court has jurisdiction over these appeals and that the questions presented are substantial. Although these cases could be summarily affirmed in light of this Court's decision last term in Texas v. Johnson, 109 S. Ct. 2533 (1989), appellees agree that the Court should grant plenary review.

II. STATEMENT OF THE CASE

These are the only two cases nationwide that the United States has prosecuted in the five months that the Flag Protection Act of 1989 (Act), Pub. L. No. 101-131, 103 Stat. 777 (amending 18 U.S.C. §700), has been in effect. The Act provides that "[w]hoever knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon any flag of the United States shall be fined under this title or imprisoned for not more than one year, or both." 18 U.S.C. §700(a)(1). An exception follows, providing that the law "does not prohibit any conduct consisting of the disposal of a flag when it has become worn or soiled." 18 U.S.C. §700(a)(2). The statute defines "flag of the United States" as "any flag of the United States, or any part thereof, made of any substance, of any size, in a form that is commonly displayed."

18 U.S.C. §700(b).

These cases arise out of political demonstrations that took place in, respectively, Seattle, Washington and Washington, D.C., in the days immediately following the Act's becoming law. In both cases, defendants admitted that they burned United States flags, and moved to dismiss the charges on the grounds that the Flag Protection Act is unconstitutional as applied to their politically expressive conduct and on its face.¹

Appellees maintained below, and both district courts agreed, that dismissal is compelled by this Court's ruling last term in Texas v. Johnson. In Johnson, this Court held that while the government has an

¹The government alleges that the flag burned in the Seattle demonstration at issue in United States v. Haggerty was a flag owned by the United States Postal Service. The flags burned in the incident that led to United States v. Eichman were indisputably appellees' own property.

interest in the flag's symbolic value, that interest is not sufficiently compelling to justify "criminally punish[ing] a person for burning a flag as a means of political protest." 109 S. Ct. at 2547. The government's interest in the flag permits it to persuade and encourage people to respect the flag, but does not permit it to compel the appearance of respect under penalty of imprisonment. Id.

Both district courts followed Johnson and ruled that the Flag Protection Act was unconstitutional as applied to appellees' politically expressive flagburnings. Each court first determined that appellees' conduct was sufficiently expressive to raise First Amendment concerns, a point no party disputed. Haggerty J.S. App. 5a; Eichman J.S. App. 9a-10a. Each court then concluded, as did this Court in Johnson, that because the government's interest in

protecting the flag is to preserve its symbolic value, and because that value can be impaired, if at all, only to the extent that conduct expresses disrespect for the flag, the governmental interest is necessarily "related to the suppression of free expression." Haggerty J.S. App. 10a; Eichman J.S. App. 11a; Johnson, 109 S. Ct. at 2542. Accordingly, the more lenient standard of First Amendment review articulated in United States v. O'Brien, 391 U.S. 367 (1968), is inapplicable, and the government must advance a compelling state interest.

The only interest Congress identified in enacting the Flag Protection Act was to preserve the flag's symbolic value, and in the district court proceedings the Government and counsel for the Senate and House Majority Leadership conceded that this was Congress's interest. But as both

district courts noted, that is the precise interest this Court found insufficient in Johnson. Haggerty J.S. App. 13a-15a; Eichman J.S. App. 14a-15a; Johnson, 109 S. Ct. at 2547.

In its amicus brief, counsel for the House Majority Leadership also articulated an interest in the flag as an "incident of sovereignty," but both courts found that interest analytically indistinguishable from the interest in the flag's symbolic value. Haggerty J.S. App. 12a-13a; Eichman J.S. App. 15a-16a. Therefore, both courts correctly concluded that the asserted governmental interests did not justify criminally punishing respondents for their politically-motivated flagburnings. Haggerty J.S. App. 13a-15a; Eichman J.S. App. 15a-17a.

Appellees also maintain that the Act is unconstitutional on its face, because it is

impermissibly content-based, overbroad, and vague.² It is content-based because it singles out for protection one symbol, with a particular content, among all symbols. It is therefore analytically indistinguishable from a statute prohibiting burning of the Democratic Party flag or copies of The Federalist Papers. Moreover, the Act prohibits only those forms of flag conduct which have historically been viewed as expressing protest or dissent.

In addition, several of the Act's specific terms are content-based. "Physically defile" was added to the statute expressly to reach acts that do no permanent

²Neither district court expressly reached appellees' facial claim, although each determined that the Flag Protection Act was indeed content-based, (Haggerty J.S. App. 13a-14a; Eichman J.S. App. 9a-10a), and not justified by a compelling government interest. Therefore, both courts implicitly found the Act facially unconstitutional as well. Appellees will continue to press their "as applied" and facial claims in this Court.

physical harm to the flag, but nonetheless "injure the flag as a symbol of the United States" and "which most definitely do[] give offense." 135 Cong. Rec. S12616 (daily ed. Oct. 4, 1989). The clause that prohibits maintaining the flag on the floor or ground was added, not because such conduct was deemed to harm the flag's physical integrity, but in direct response to appellee Scott Tyler's flag exhibit at the School of the Art Institute of Chicago in March of last year. See 135 Cong. Rec. S2811 (daily ed. March 16, 1989). And the Act creates an exception for those who burn "worn or soiled" flags, added because Congress did not want to "'make criminals out of every member of a veterans' post that has a ceremonial burning of a worn-out flag on Memorial Day." H.R. Rep. No. 231, 101st

Cong., 1st Sess. 9 (Sept. 7, 1989).³

III. WHILE SUMMARY AFFIRMANCE MIGHT BE APPROPRIATE, APPELLEES BELIEVE THAT THE CASES SHOULD BE SET FOR PLENARY HEARING

The United States effectively concedes that Johnson controls these cases. It admits that the unprecedented theory it advances for upholding the Act -- that flagburning should be deemed unprotected activity in the first instance -- is "in tension" with Johnson, something of an understatement. Haggerty J.S. 27; Eichman J.S. 25. And it asks the Court to "reconsider" an argument -- that the availability of other means of protest

³The Act is overbroad because it forbids a multitude of expressive acts that do no harm to the flag's symbolic value or physical integrity, and in its definition of "flag of the United States." It is vague because it gives no guidance for determining when a flag is sufficiently "soiled or worn" to permit its destruction, nor for determining when a flag is "in a form commonly displayed."

should justify criminalizing this one -- which the Court flatly rejected in both Johnson, 109 S. Ct. at 2546 n.11, and Spence v. Washington, 418 U.S. 405, 411 n.4 (1974). Haggerty J.S. 23 n.16; Eichman J.S. 22 n.15. In Congress, the Administration testified repeatedly and forcefully that "[i]n the face of the Court's holdings in Texas v. Johnson and Spence v. Washington, and especially given the sweeping reasoning in those cases, it cannot be seriously maintained that a statute aimed at protecting the Flag would be constitutional." Statutory and Constitutional Responses to the Supreme Court Decision in Texas v. Johnson: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 101st Cong., 1st Sess. 183 (1989) ("House Hearings") (Written Testimony of Assistant Attorney General William Barr,

Office of Legal Counsel).

In light of this Court's clear pronouncement less than one year ago in Johnson, and the two well-reasoned decisions below, appellees agree with Mr. Barr "it cannot be seriously maintained" that the Flag Protection Act is constitutional. This appeal might therefore be suitable for summary affirmance, and such a resolution would not be inconsistent with the literal terms of the statutory mandate that the Court take the appeal. However, appellees believe that the spirit of Congress's statutory directive, the constitutional implications of this case, and the strong public interest in the issues, weigh in favor of plenary hearing.

Should the Court choose the latter course, it should do so in a manner that will permit the issues to be briefed fully and carefully. As appellees have noted

previously, the schedule proposed by the Government, which would require submission of simultaneous briefs approximately two weeks after the Court decides to take the cases, replies one week later, and argument two days thereafter, gravely infringes upon appellees' due process rights, and is certainly not designed to provide for careful briefing of the issues.

Congress considered the legal questions posed by Johnson as applied to a federal flag statute sufficiently complex and important to require extended hearings over the course of several months.⁴ The records of those hearings alone amount to 1,326 pages, and include testimony from three ex-Solicitors General, a sitting United States

⁴Hearings on Measures to Protect the Physical Integrity of the American Flag: Hearings on S. 1338, H.R. 2978, and S.J. Res. 180 Before the Senate Comm. on the Judiciary, 101st Cong., 1st Sess. (1989) ("Senate Hearings"); House Hearings, supra.

judge, and seventeen law professors, offering various analyses and advice. All three past Solicitors General -- Charles Fried, Robert Bork, and Erwin Griswold -- agreed that any statutory enactment to protect the flag would be unconstitutional.⁵ Several professors disagreed, including Professor Laurence Tribe of Harvard Law School, who argued that a statute designed affirmatively to protect the flag as a symbol would withstand constitutional scrutiny.⁶ And as noted above, Assistant Attorney General Barr argued on behalf of the Administration that any flag statute would be unconstitutional.⁷

In view of Congress's determination that

⁵Senate Hearings at 99 (Bork); id. at 248 (Griswold); House Hearings at 219 (Fried); id. at 199 (Bork).

⁶Senate Hearings at 99-124; House Hearings at 140-80.

⁷Senate Hearings at 64-139; House Hearings at 166-99.

the constitutional questions deserved careful and lengthy consideration before amending the flag statute, this Court should similarly allow sufficient time for a full and adequate airing of the legal issues before deciding the constitutional validity of the Act.

In the district court, the statute's defenders included the United States Attorney, the Senate, and the House Majority Leadership, all of whom offered differing analyses for upholding the statute. See Haggerty J.S. App. 4a ("While all three briefs argue that the Flag Protection Act is distinguishable from the law reviewed in Johnson and thus constitutional, they reach that end by differing and even conflicting means.") The United States has hinted in its Jurisdictional Statements that its theory in the Supreme Court will be different from that advanced in the lower

courts. In addition, several amici are likely to support the statute, and may offer still different analyses. To require appellees to file simultaneous opening briefs without even seeing the briefs of appellant and its supporters, and to respond to all of these varying positions in one week, would not be consistent with the importance Congress itself placed on this issue.

As noted previously, moreover, to expedite briefing to the extent suggested by the United States would denigrate appellees' due process right to brief the Court on a matter whose outcome could determine whether they will be incarcerated for up to one year. We trust that the importance of this issue is not lost on any of the parties or amici before the Court. That importance is disserved by such a truncated briefing and argument schedule as the Government has

proposed.⁸

V. CONCLUSION

While the Court could summarily affirm this case, appellees believe that probable jurisdiction should be noted and the case set down for a full hearing, with a briefing and argument schedule that permits the matters to be briefed with the care and consideration that they deserve.

⁸Should the Court elect to set the cases for plenary hearing, appellees believe that it would be appropriate to consolidate argument in the cases, provided that counsel for appellees are allowed to divide their portion of the argument equally. Appellees in the two cases have had and are likely to continue to have divergent interests, but counsel believe that those interests can be represented fully if William Kunstler represents the appellees in United States v. Eichman and David Cole represents the appellees in United States v. Haggerty, each sharing half of the argument time in a single argument. This would serve judicial economy while ensuring that appellees' interests are adequately represented.

Respectfully submitted,

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(4) (3)
Nos. 89-1433 and 89-1434

Supreme Court, U.S.
FILED
APR 12 1990
JOSEPH F. SPANIOLO, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1989

UNITED STATES OF AMERICA, APPELLANT

v.

SHAWN D. EICHMAN, ET AL.

UNITED STATES OF AMERICA, APPELLANT

v.

MARK JOHN HAGGERTY, ET AL.

**ON APPEALS FROM THE UNITED STATES DISTRICT COURTS
FOR THE DISTRICT OF COLUMBIA AND THE WESTERN DISTRICT
OF WASHINGTON**

JOINT APPENDIX

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**Jurisdictional Statement in No. 89-1433 filed March 13, 1990
Jurisdictional Statement in No. 89-1434 filed March 13, 1990
Probable Jurisdiction Noted March 30, 1990**

BEST AVAILABLE COPY

88 pp
folded

In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1433

UNITED STATES OF AMERICA, APPELLANT

v.

SHAWN D. EICHMAN, ET AL.

No. 89-1434

UNITED STATES OF AMERICA, APPELLANT

v.

MARK JOHN HAGGERTY, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURTS
FOR THE DISTRICT OF COLUMBIA AND THE WESTERN DISTRICT
OF WASHINGTON

JOINT APPENDIX

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UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Criminal No. 89-0419

UNITED STATES OF AMERICA

v.

SHAWN D. EICHMAN

DOCKET ENTRIES

DATE	NR	PROCEEDINGS
1989		
Oct. 31	1	Filed information (Dkt'd 11/07/89). Cases assigned to JUDGE JUNE L. GREEN (Dkt'd 11/07/89). — Category A (Dkt'd 11/07/89).
Oct. 31	2	Order defendant released on personal recognizance with conditions (MAG- ISTRATE ROBINSON) (Dkt'd 11/07/89). US Attorney ISCOE, CRAIG added to case (Dkt'd 11/07/89).
Nov. 2	4	Arraignment and plea set for 11/06/89 (Count 1) (Dkt'd 12/13/89).
Nov. 5	5	Arraignment held (Count 1) (deft's mo- tion due 12-14-89, govt's response due 1-12-90, def't's reply due 1-17-90, def't pers. recog. (REP: G. Slodysko)) (JUDGE JUNE L. GREEN) (Dkt'd 12/14/90). Defendant's first appearance (Dkt'd 12/14/89).

DATE	NR	PROCEEDINGS
		Defendant appears with counsel (Dkt'd 12/14/89).
		Defendant enters plea of not guilty (Count 1) (Dkt'd 12/14/89).
Nov. 7	6	Order filed (directing all pretrial motions be filed by 12-14-89, gov'ts response due 1-12-90, defts reply due 1-17-90 (N) (signed 11-6-89)) (JUDGE JUNE L. GREEN) (Dkt'd 12/14/89).
Nov. 13	7	Order filed (directing that all pretrial motions by deft be filed by 12-4-89, govt's response due by 1-12-90, deft's reply due by 1-17-90 (N)) (JUDGE JUNE L. GREEN) (Dkt'd 12/19/89).
Nov. 28	8	Order filed (granting motion of deft. to extend time to file pretrial motions. (N)) (JUDGE JUNE L. GREEN) (Dkt'd 01/10/90).
Nov. 28	9	Motion for extension of time to file pretrial motions filed (MOT#1) (Count 1) (Dkt'd 01/10/90).
Nov. 28	10	Motion for extension of time to file pretrial motions granted (MOT#1) (JUDGE JUNE L. GREEN) (Dkt'd 01/10/90).
Dec. 5	11	Appearance of COLE, DAVID as co-counsel for defendant (Dkt'd 01/16/90).
Dec. 5	12	Motion to dismiss filed (MOT#2) (Count 1) (by deft. Supporting Memo. Addenda A-G and Exhibits 1-5.) (Dkt'd 01/16/90).

DATE	NR	PROCEEDINGS
Dec. 5	13	Mark the beginning of a potential excludable period of type X-E starting on 12/05/89 ((In re MOTFDC#2 on 12/5/89)) (Dkt'd 01/16/90).
1990		
Jan. 12	14	Notice filed (Notice of Appearance of the U.S. Senate as amicus curiae with Memorandum of U.S. Senate as Amicus Curiae in support of Constitutionality of the Flag Protection Act of 1989.) (Dkt'd 02/13/90).
Jan. 12	15	Motion filed (MOT#3) (of the Speaker and Leadership Group of the House of Representatives to appear as Amicic Curiae, with Memorandum of the Speaker and Leadership Group of the U.S. House of Representatives in opposition to deft.'s Motion to Dismiss. Exhibits 1-27.) (Dkt'd 02/13/90).
Jan. 12	16	Memorandum in opposition to motion to dismiss (MOT#2) (by govt., with Attachments A & B.) (Dkt'd 02/13/90).
Jan. 12	17	Motion filed (MOT#4) (by deft. for extension of time to file reply memo.) (Dkt'd 02/13/90).
Jan. 12	18	Mark the beginning of a potential excludable period of type X-E starting on 01/12/90 ((In re MOTFOD#4 on 1/12/90)) (Dkt'd 02/13/90).

DATE	NR	PROCEEDINGS
Jan. 16	19	Order filed (granting def't.'s motion for extension of time within which to file reply motion. Pretrial motions to be filed no later than 1/23/90. (N)) (JUDGE JUNE L. GREEN) (Dkt'd 02/13/90).
Jan. 16	20	Motion granted (MOT#4) for def't. for extension of time to file reply memo.) (JUDGE JUNE L. GREEN) (Dkt'd 02/13/90).
Jan. 16	21	Excludable delay due to hearings on Pretrial Motions began on 01/12/90 and ended on 01/16/90 (Dkt'd 02/13/90).
Jan. 17	22	Order filed (granting motion of the Speaker and Leadership Group of the U.S. House of Representatives to appear a[s] amici curiae. (N)) (JUDGE JUNE L. GREEN) (Dkt'd 02/13/90).
Jan. 17	23	Motion granted (MOT#3) (to appear amici curiae.) (JUDGE JUNE L. GREEN) (Dkt'd 02/13/90).
Jan. 17	24	Memorandum in Opposition to motion to dismiss (MOT#2) (by the Speaker and Leadership Group of the U.S. House of Representatives.) (Dkt'd 02/13/90).
Jan. 23	25	Memorandum in support of motion to dismiss (MOT#2) (Def'ts reply memorandum in support of motion to dismiss) (Dkt'd 02/20/90).

DATE	NR	PROCEEDINGS
Jan. 23	26	Motion filed (MOT#5) (for oral argument regarding the constitutionality of the flag protection act of 1989) (Dkt'd 02/20/90).
Feb. 1	27	Status hearing held (status.) (Dkt'd 02/22/90).
Feb. 1	28	Status hearing set for 02/22/90 @ 1:30 PM (for oral argument. Def't. not present. (REP: Carrie Gansle)) (JUDGE JUNE L. GREEN) (Dkt'd 02/22/90).
Feb. 5	29	Order filed (setting oral argument on 2/22/90 at 1:30 pm., directing def't. to be present. (N)) (JUDGE JUNE L. GREEN) (Dkt'd 02/27/90).
Feb. 22	30	Status hearing held (Motion by dft. to dismiss heard and taken under advisement. (REP: Kay Moomey (Miller))) (JUDGE JUNE L. GREEN) (Dkt'd 03/16/90).
Feb. 22	31	Motion to dismiss taken under advisement (MOT#2) (JUDGE JUNE L. GREEN) (Dkt'd (Dkt'd 03/16/90).
Feb. 22	32	Mark the beginning of a potential excludable period of type X-G starting on 02/22/90 and not to extend beyond 03/23/90 ((In re MOTADVADC#2 on 2/22/90)) (Dkt'd 03/16/90).
Mar. 5	33	OPINION. (N) (JUDGE JUNE L. GREEN) (Dkt'd 03/23/90). Order filed (granting def't.'s motion to dismiss. (N)) (JUDGE JUNE L. GREEN) (Dkt'd 03/23/90).

DATE	NR	PROCEEDINGS
Mar. 5	34	Dismissed (Count 1) (Order granting deft.s motion to dismiss.) (JUDGE JUNE L. GREEN) (Dkt'd 03/23/90).
Mar. 5	35	Motion to dismiss granted (MOT#2) (of deft.) (JUDGE JUNE L. GREEN) (Dkt'd 03/23/90).
Mar. 5	36	Excludable delay due to hearings on Pre-trial Motions began on 12/05/89 and ended on 03/05/90 (Dkt'd 03/23/90).
Mar. 5	37	Excludable delay while defendant motion under advisement, began on 02/22/90 and ended on 03/05/90 (Dkt'd 03/23/90).
Mar. 6	38	Filed transcript of proceedings for 02/22/90 (Pages 1-56. (REP: Katherine K. Moomey, Miller Reporting Co.)) (Dkt'd 03/23/90).
Mar. 6	39	Filed notice of appeal to Supreme Court (Count 1) (APPL#1) (by govt., from the orders of USDC filed on 3/5/90 dismissing the criminal information filed in this matter.) (Dkt'd 03/23/90).
Mar. 17	40	(APPL#1) (Receipt of Notice of Filing Appeal, from Office of the Clerk, Supreme Court of the U.S., dated 3/13/90, No. 89-1433, October Term, 1989.) (Dkt'd 03/23/90).

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal No. 89-0420

UNITED STATES OF AMERICA

v.

DAVID GERALD BLALOCK

DOCKET ENTRIES

DATE	NR	PROCEEDINGS
1989		
Oct. 31	1	Filed information (Dkt'd 11/07/89). Cases assigned to JUDGE JUNE L. GREEN (Dkt'd 11/07/89). — Category A (Dkt'd 11/07/89).
Oct. 31	2	Order defendant released on personal recognizance with conditions (MAGISTRATE ROBINSON) (Dkt'd 11/07/89).
Oct. 31	3	Appearance of attorney K[UN]STLER, WILLIAM (Dkt'd 11/07/89) US Attorney ISCOE, CRAIG added to case (Dkt'd 11/07/89).
Nov. 2	4	Arraignment and plea set for 11/06/89 (Count 1) (Dkt'd 12/13/89).
Nov. 5	5	Arraignment held (Count 1) (deft's motion due 12-14-89, govt's response due 1-12-90, deft's reply due 1-17-90, deft pers. recog. (REP: G. Slodysko))

DATE	NR	PROCEEDINGS
		(JUDGE JUNE L. GREEN) (Dkt'd 12/14/90).
		Defendant's first appearance (Dkt'd 12/14/89).
		Defendant appears with counsel (Dkt'd 12/14/89).
		Defendant enters plea of not guilty (Count 1) (Dkt'd 12/14/89).
Nov. 7	6	Order filed (directing all pretrial motions be filed by 12-14-89, govt's response due 1-12-90, defts reply due 1-17-90 (N) (signed 11-6-89)) (JUDGE JUNE L. GREEN) (Dkt'd 12/14/89).
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Nov. 28	8	Order filed (granting motion of def[']t to extend time to file pretrial motions. (N)) (JUDGE JUNE L. GREEN) (Dkt'd 01/10/90).
Nov. 28	9	Motion for extension of time to file pretrial motions filed (MOT#1) (Count 1) (Dkt'd 01/10/90).
Nov. 28	10	Motion for extension of time to file pretrial motions granted (MOT#1) (JUDGE JUNE L. GREEN) (Dkt'd 01/10/90).
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1990		
Jan. 12	14	Notice filed (MOT#3) (by deft. for extension of time to file reply motion.) (Dkt'd 02/13/90).
Jan. 12.	15	Mark the beginning of a potential excludable period of type X-E starting on 01/12/90 ((In re MOTFOD#3 on 1/12/90)) (Dkt'd 02/13/90).
Jan. 12	16	Motion filed (MOT#4) (by the Speaker and Leadership Group of the House of Representatives to appear as Amici Curiae. (EXHIBIT: Memo in opposition to deft.'s motion to dismiss, with Exhibits 1-27)) (Dkt'd 02/13/90).
Jan. 12	17	Mark the beginning excludable period of type X-E starting on 01/12/90 ((In re MOTFOD#4 on 1/12/90)) (Dkt'd 02/13/90).
Jan. 12	18	Notice filed (of appearance of the U.S. Senate as amicus curiae, with Memorandum as amicus curiae, in support of constitutionality of the Flag Protection Act of 1989.) (Dkt'd 02/13/90).

DATE	NR	PROCEEDINGS
Jan. 12	19	Memorandum in opposition to motion to dismiss (MOT#2) (by govt., with Attachments A and B.) (Dkt'd 02/13/90).
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Jan. 16	21	Motion granted (MOT#3) for def't. for extension of time to file reply memo.) (JUDGE JUNE L. GREEN) (Dkt'd 02/13/90).
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Jan. 17	24	Motion granted (MOT#4) (to appear amici curiae.) (JUDGE JUNE L. GREEN) (Dkt'd 02/13/90).
Jan. 17	25	Memorandum in Opposition to motion to dismiss (MOT#2) (by the Speaker and Leadership Group of the U.S. House of Representatives.) (Dkt'd 02/13/90).

DATE	NR	PROCEEDINGS
Jan. 17	26	Excludable delay due to hearings on Pretrial Motions began on 01/12/90 and ended on 01/17/90 (Dkt'd 02/13/90).
Jan. 23	27	Memorandum in support of motion to dismiss (MOT#2) (Defts reply memorandum in support of motion to dismiss) (Dkt'd 02/20/90).
Jan. 23	28	Motion filed (MOT#5) (for oral argument regarding the constitutionality of the flag protection act of 1989) (Dkt'd 02/20/90).
Feb. 1	29	Status hearing held (status.) (Dkt'd 02/22/90).
Feb. 1	30	Status hearing set for 02/22/90 @ 1:30 PM (for oral argument. Def't. not present. (REP: Carrie Gansle)) (JUDGE JUNE L. GREEN) (Dkt'd 02/22/90).
Feb. 5	31	Order filed (setting oral argument on 2/22/90 at 1:30 pm., directing def't. to be present. (N)) (JUDGE JUNE L. GREEN) (Dkt'd 02/27/90).
Feb. 22	32	Status hearing held (Oral Motion attorney Nina Kraut for admission, pro hac vice of David Cole as counsel for dft Blalock, heard and granted. Motion by dft to dismiss heard and taken under advisement. (REP: Kay Moomey (Miller))) (JUDGE JUNE L. GREEN) (Dkt'd 03/16/90).

DATE	NR	PROCEEDINGS
Feb. 22	33	Motion to dismiss taken under advisement (MOT#2) (JUDGE JUNE L. GREEN) (Dkt'd 03/16/90).
Feb. 22	34	Mark the beginning of a potential excludable period of type X-G starting on 02/22/90 and not to extend beyond 03/23/90 ((In re MOTADVADC#2 on 2/22/90)) (Dkt'd 03/16/90).
Feb. 22	35	Appearance of attorney COLE, DAVID (JUDGE JUNE L. GREEN) (Dkt'd 03/16/90).
Mar. 5	36	OPINION. (N) (JUDGE JUNE L. GREEN) (Dkt'd 03/23/90). Order filed (granting deft.'s motion to dismiss. (N)) (JUDGE JUNE L. GREEN) (Dkt'd 03/23/90).
Mar. 5	37	Motion to dismiss granted (MOT#2) (of deft.) (JUDGE JUNE L. GREEN) (Dkt'd 03/23/90).
Mar. 5	38	Excludable delay due to hearings on Pre-trial Motions began on 12/05/89 and ended on 03/05/90 (Dkt'd 03/23/90).
Mar. 5	39	Dismissed (Count 1) (Order granting deft.'s motion to dismiss.) (JUDGE JUNE L. GREEN) (Dkt'd 03/23/90).
Mar. 5	40	Excludable delay while defendant motion under advisement, began on 02/22/90 and ended on 03/05/90 (Dkt'd 03/23/90).
Mar. 6	41	Filed transcript of proceedings for 02/22/90 (Pages 1-56. (REP: Katherine K. Moomey, Miller Reporting Co.)) (Dkt'd 03/23/90).

DATE	NR	PROCEEDINGS
Mar. 6	42	Filed notice of appeal to Supreme Court (Count 1) (APPL#1) (by govt., from the orders of USDC filed on 3/5/90 dismissing the criminal information filed in this matter.) (Dkt'd 03/23/90).
Mar. 17	43	(APPL#1) (Receipt of Notice of Filing Appeal, from Office of the Clerk, Supreme Court of the U.S., dated 3/13/90, No. 89-1433, October Term, 1989.) (Dkt'd 03/23/90).

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal No. 89-0421

UNITED STATES OF AMERICA

v.

SCOTT W. TYLER

DOCKET ENTRIES

DATE	NR	PROCEEDINGS
1989		
Oct. 31	1	Filed information (Dkt'd 11/07/89). Cases assigned to JUDGE JUNE L. GREEN (Dkt'd 11/07/89). - Category A (Dkt'd 11/07/89).
Oct. 31	2	Order defendant released on personal recognizance with conditions (MAGISTRATE ROBINSON) (Dkt'd 11/07/89).
Oct. 31	3	Order appointing attorney KRAUT, NINA to represent defendant (Dkt'd 11/07/89). US Attorney ISCOE, CRAIG added to case (Dkt'd 11/07/89).
Nov. 2	4	Arraignment and plea set for 11/06/89 @ 1:30 PM (Count 1) (before Judge June Green) (Dkt'd 12/05/89). Defendant's first appearance (Dkt'd 12/05/89).

DATE	NR	PROCEEDINGS
		Defendant appears with counsel (Dkt'd 12/05/89).
		Defendant enters plea of not guilty (Count 1) (defts motions due 12/14/89, Govts respon[s]e due 1/12/90 and defts reply due 1/17/90. Def. per. recog. (Rep: G. Slodysko)) (JUDGE JUNE L. GREEN) (Dkt'd 12/05/89).
Nov. 7	6	Order filed (directing all pretrial motions be filed by 12-14-89. Govt's response due 1-12-90 and defts reply due 1-17-90. Signed 11/6/89. (N) (JUDGE JUNE L. GREEN) (Dkt'd 12/05/89).
Nov. 13	7	Order filed (directing that all pretrial motions by deft be filed by 12/4/89, Govts response due by 1/12/90 and defts reply due by 1/17/90 (N)) (JUDGE JUNE L. GREEN) (Dkt'd 12/05/89).
Nov. 28	8	Order filed (granting motion of deft. to extend time to file pretrial motions. (N)) (JUDGE JUNE L. GREEN) (Dkt'd 12/14/89).
Nov. 28	9	Motion for extension of time to file pretrial motions filed (MOT#1) (Count 1) (Dkt'd 12/14/89).
Nov. 28	10	Motion for extension of time to file pretrial motions granted (MOT#1) (JUDGE JUNE L. GREEN) (Dkt'd 12/14/89).

DATE	NR	PROCEEDINGS
Dec. 5	11	Motion to dismiss filed (MOT#2) (Count 1) (Supplemental Memorandum. Addenda A-G and Exhibits 1-5.) (Dkt'd 12/14/89).
Dec. 5	12	Mark the beginning of a potential excludable period of type X-E starting on 12/05/89 ((In re MOTFDC#2 on 12/5/89)) (Dkt'd 01/16/90).
Dec. 5	13	Appearance of COLE, DAVID as co-counsel for defendant (Dkt'd 12/14/89).
1990		
Jan. 12	14	Motion filed (MOT#3) (of the Speaker and Leadership Group of The House of Representatives to appear as Amici Curiae. (Memorandum in opposition to defts motion to dismiss and Exhibits 1-27)) (Dkt'd 02/13/90).
Jan. 12	15	Motion filed (MOT#4) (to extend time within which to file reply motion.) (Dkt'd 02/08/90).
Jan. 12	16	Notice filed (of appearance of the United States Senate as Amicus Curiae. Supporting Memo. (Dkt'd 02/08/90).
Jan. 12	17	Memorandum in opposition to motion to dismiss (MOT#2) (Attachment A&B) (Dkt'd 02/08/90).
Jan. 16	18	Order filed (granting defts motion for extension of time within which to file Reply Motion, Pretrial motions to be filed not later than 1/23/90. (N) (Original filed in CR. 89-419)) (JUDGE JUNE L. GREEN) (Dkt'd 02/08/90).

DATE	NR	PROCEEDINGS
Jan. 16	19	Motion granted (MOT#4) (JUDGE JUNE L. GREEN) (Dkt'd 02/08/90).
Jan. 17	20	Order filed (granting motion of the Speaker and Leadership Group of U.S. House of Representatives to appear as amici curiae. (N)) (JUDGE JUNE L. GREEN) (Dkt'd 02/08/90).
Jan. 17	21	Motion granted (MOT#3) (JUDGE JUNE L. GREEN) (Dkt'd 02/08/90).
Jan. 23	22	Memorandum in support of motion to dismiss (MOT#2) (Defts reply memorandum in support of motion to dismiss.) (Dkt'd 02/13/90).
Jan. 23	28	Motion filed (MOT#5) (for oral argument regarding the constitutionality of the Flag Protection Act of 1989) (Dkt'd 02/13/90).
Feb. 1	24	Status hearing held (status.) (Dkt'd 02/15/90).
Feb. 1	25	Status hearing set for 02/22/90 @ 1:30 PM (for oral argument. Deft. not present. (Rep: C. Gansle)) (JUDGE JUNE L. GREEN) (Dkt'd 02/15/90).
Feb. 5	26	Order filed (setting oral argument on 2/22/90 at 1:30 pm., directing deft. to be present. (N)) (JUDGE JUNE L. GREEN) (Dkt'd 02/27/90).
Feb. 22	27	Status hearing held (Dkt'd 03/16/90).
Feb. 22	28	Motion to dismiss taken under advisement MOT#2) (of deft. (REP: Kay Moomey, Miller Reporting Co.)) (JUDGE JUNE L. GREEN) (Dkt'd 03/16/90).

DATE	NR	PROCEEDINGS
Feb. 22	29	Mark the beginning of a potential excludable period of type X-G startings on 02/22/90 and not to extend beyond 03/23/90 ((In re MOTADVDC#2 on 2/22/90) (Dkt'd 03/16/90).
Feb. 22	30	Excludable delay due to hearings on Pretrial Motions began on 12/05/89 and ended on 02/22/90 (Dkt'd 03/16/90).
Mar. 5	31	OPINION. (N) (JUDGE JUNE L. GREEN) (Dkt'd 03/23/90). Order filed (granting deft.'s motion to dismiss. (N)) (JUDGE JUNE L. GREEN) (Dkt'd 03/23/90).
Mar. 5	32	Motion to dismiss granted (MOT#2) (of deft.) (JUDGE JUNE L. GREEN) (Dkt'd 03/23/90).
Mar. 5	33	Dismissed (Count 1) (Order granting deft.'s motion to dismiss.) (JUDGE JUNE L. GREEN) (Dkt'd 03/23/90).
Mar. 5	34	Excludable delay while defendant motion under advisement, began on 02/22/90 and ended on 03/05/90 (Dkt'd 03/23/90).
Mar. 6	35	Filed transcript of proceedings for 02/22/90 (Pages 1-56. (REP: Katherine K. Moomey, Miller Reporting Co.)) (COPY—Original filed in CR 89-419)) (Dkt'd 03/23/90).
Mar. 6	36	Filed notice of appeal to Supreme Court (Count 1) (APPL#1) (by gov., from order of USDC filed on 3/5/90 dis-

DATE	NR	PROCEEDINGS
		missing the criminal information filed in this matter.) (Dkt'd 03/23/90).
Mar. 19	37	(APPL#1) (Receipt of Notice of Filing Appeal, from Office of the Clerk, Suprem Court of the U.S., dated 3/13/90, No. 89-1433, October Term, 1989.) (Dkt'd 03/23/90).

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. CR89-315-R

UNITED STATES OF AMERICA

v.

MARK JOHN HAGGERTY, JENNIFER CAMPBELL,
DARIUS STRONG, CARLOS GARZA

DOCKET ENTRIES

DATE	NR	PROCEEDINGS
1989		
Nov. 28	1	AFFIDAVIT of Steven M. Dean & Stanley R. Pilkey w/exhibits A (Video Tape) & B-G (Photos)
Nov. 28	2	INFORMATION Warrants iss for defts 02-06.
Nov. 28	3	PRAECIPE for issuance of summons to deft <i>Haggerty</i> . Iss
Nov. 28	4	MOTION of Govt to seal Information & Affidavit
Nov. 28	5	ORDER (JLW) sealing Motion, Information & Affidavit <i>until</i> the first appearance of <i>any</i> deft <i>or</i> until further order of the Court. cc AUSA
Nov. 28	6	FINANCIAL AFFIDAVIT of deft <i>Stone/Strong</i>

DATE	NR	PROCEEDINGS
Nov. 28	7	ORDER (JLW) appointing CJA Charles Hamilton for deft <i>Stone/Strong</i>
Nov. 28	8	ENT (JLW) ARRAIGNMENT of deft <i>Stone/Strong</i> : Tape W1438; AUSA Robert Chadwell; def cns1 Charles Hamilton. Deft in custody. Deft pleads <i>NOT GUILTY</i> . TD set before PKS on 2/5/90 @ 9:00AM. PT mtns due 12/21/89. Deft requests discovery. PR bond set w/PTS supervision & drug conditions. Govt moves to amend Information to reflect true name of deft as Darius Strong.
Nov. 28	9	CONSENT & WAIVER of deft <i>Strong</i>
Nov. 28	10	APPEARANCE BOND of deft <i>Strong</i>
Nov. 29	11	FINANCIAL AFFIDAVIT of deft <i>Haggerty</i>
Nov. 29	12	ORDER (JLW) appointing CJA John Mellen for deft <i>Haggerty</i>
Nov. 29	13	ENT (JLW) ARRAIGNMENT of deft <i>Haggerty</i> : Tape W1439; AUSA Robert Chadwell; def cns1 John Mellen. Deft pleads <i>NOT GUILTY</i> . TD set before PKS on 2/5/90 @ 9:00 AM. PT mtns due 12/21/89. Deft requests discovery. PR bond set.
Nov. 29	14	CONSENT & WAIVER of deft <i>Haggerty</i>
Nov. 29	15	APPEARANCE BOND of deft <i>Haggerty</i>
Dec. 1	16	USMS RETURN of Warrant for arrest of deft <i>Stone</i> executed 11/28/89

DATE	NR	PROCEEDINGS
Dec. 1	17	ENT (JLW) ARRAIGNMENT of deft <i>Garza</i> : Tape W1443; AUSA Robert Chadwell; def cnsl Kevin Peck; in custody. Consent & Waiver refused. Deft pleads <i>NOT GUILTY</i> to Information. PT mtns due 12/21/89; def requests discovery. PR Bond set w/PT services & drug conditions. Case to be reassigned to District Judge. 2/5/90 TD cancelled.
Dec. 1	18	APPEARANCE BOND of deft <i>Garza</i>
Dec. 1	19	FINANCIAL AFFIDAVIT of deft <i>Garza</i>
Dec. 1	20	ORDER (PKS) appointing Kevin Peck as CJA for deft <i>Garza</i>
Dec. 4	21	ENT (PKW) ARRAIGNMENT of deft Jane Doe as true name of <i>Jennifer Campbell</i> : Tape S1225; AUSA Robert Chadwell; deft cnsl Colin Kippen. In custody. Deft pleads <i>NOT GUILTY</i> to Information. TD set before Judge Rothstein. PT motions due 12/21/89 & def requests discovery. PR Bond set.
Dec. 4	22	FINANCIAL AFFIDAVIT of deft <i>Campbell</i>
Dec. 4	23	ORDER (PKS) appointing Colin Kippen as CJA for deft <i>Campbell</i>
Dec. 4	24	APPEARANCE BOND of deft <i>Campbell</i>
Dec. 5	25	USMS RETURN of Warrant for arrest of deft <i>Jane Doe</i> executed 12/4/89

DATE	NR	PROCEEDINGS
Dec. 5	26	USMS RETURN of Warrant for arrest of deft <i>Garza</i> executed 12/1/89
Dec. 8	27	MINUTE ENTRY Jury trial is scheduled in this matter for 2/5/90 at 9:30 a.m.
Dec. 11	28	NOTICE OF APPEARANCE – of counsel for deft. <i>GARZA</i> .
Dec. 11	29	REQUEST of deft. <i>GARZA</i> for Special Notice re: discovery.
Dec. 12	30	NOTICE OF SUBSTITUTION AND WITHDRAWAL – of counsel for deft. <i>HAGERTY</i> . R. Gombiner substitutes in for J. Mellen.
Dec. 13	31	MOTION by all defendants to extend time in which to file pretrial motions from Dec 21, 1989 to Jan. 18, 1989 and to shorten time for hearing.
Dec. 15	32	NOTICE of hrg of Defts' mtn to extend time, ntd 12/29/89 **LODGED order
	33	MOTION Defts' to short time on mtn to extd, ntd 12/19/89 **LODGED order
Dec. 15	34	MOTION by William M. Kunstler for adm pro hac vice for Deft Haggerty, no fee cnsl notified
Dec. 15	35	DECLARATION of William Kunstler in sup of mtn to appear **LODGED order
Dec. 15	36	MOTION by David Cole for adm pro hac vice for Deft Haggerty, no fee cnsl notified

DATE	NR	PROCEEDINGS
Dec. 15	37	DECLARATION of David Cole in sup of mtn to appear **LODGED order
Dec. 15	38	MOTION by Ronald L. Kuby for adm pro hac vice for Deft Haggerty, no fee cnsI notified
Dec. 15	39	DECLARATION of Ronald L. Kuby **LODGED order
Dec. 15	40	AFDT of mailing
Dec. 19	41	ORDER (BJR) granting William M. Kunstler's mtn to appear as cnsI for deft <i>Haggerty</i> . Ent & cc 12/20
Dec. 19	42	ORDER (BJR) granting Ronald L. Kuby's mtn to appear as cnsI for deft <i>Haggerty</i> . Ent & cc 12/20
Dec. 19	43	ORDER (BJR) granting David Cole's mtn to appear as cnsI for deft <i>Haggerty</i> . Ent & cc 12/20
Dec. 19	44	ENT (BJR) Deft Haggerty's motion to shorten time on motion to extend pre-trial motion filing deadline and the underlying motion are GRANTED. The deadline is extended to 1/18/90. cc: cnsI, BJR
Dec. 20	45	USMS RETURN of Summons as un-executed due to deft's appearance
Dec. 21	46	MOTION by deft. <i>Strong</i> to extend time within which to file pretrial motions.
Dec. 22	47	ORDER (BJR) deft <i>Strong</i> 's motion to extend time for filing pretrial motions

DATE	NR	PROCEEDINGS
		is granted. Pretrial motions deadline is extended to 1/18/90. (cc:cnsI)
1990		
Jan. 18	48	MOTION of deft Campbell to dismiss, not noted, & oral argument requested e 1/18/90
Jan. 18	49	MOTION of deft <i>Campbell</i> to file brief in excess of 12 pages
Jan. 18	49a	Defts' Memorandum in support of mtn to dism
Jan. 18	50	AFFIDAVIT of Kevin Peck
Jan. 18	51	AFFIDAVIT of Hand delivery
Jan. 18	52	MOTION of deft <i>Strong</i> to dism the Information noted for 1/26/90, evidentiary hearing requested e 1/18/90
Jan. 18	53	MEMORANDUM of deft re: outrageous conduct of Govt officials
Jan. 18	54	AFFIDAVIT of Hand delivery
Jan. 19	55	MOTION of govn't to extend briefing schedule. NTD 2/2/90.
Jan. 19	56	AFFIDAVIT of Mark Bartlett
Jan. 19	57	MOTION of govn't to shorten time on motion to extend briefing schedule. NTD 1/24/90. **Lodged Order to extend briefing schedule **Lodged Order to shorten time

DATE	NR	PROCEEDINGS
Jan. 23	58	LETTER From Def Cnsl for Def <i>GARZA</i> re: noting date for Mtn. to Dismiss set for 1/26/90
Jan. 25	59	ORDER (BJR) Shortening Time for Mtn. of Plf to extend briefing schedule til 1/25/90. Cc & Ent. 1/25/90
Jan. 25	60	ORDER (BJR) GRANTING Mtn. of Plf to extend briefing scheduled til 2/9/90. Cc & Ent. 1/25/90
Jan. 29	61	MOTION of Speaker Thomas Foley & Leadership Group of House of Reps. to Appear as Amici Curiae
Jan. 29	62	MOTION of Amici Curiae to exceed page limit
Jan. 29	63	ORDER (BJR) GRANTING the Speaker & Leadership of the House of Representatives status to appear Amici Curiae. Cc & Ent. 1/30/90
Jan. 29	64	ORDER (BJR) GRANTING Motion of Amici Curiae to file overlength brief. Cc & Ent. 1/30/90
Jan. 29	65	MEMORANDUM of Amici Curiae in opposition to Def's Motion to Dismiss **Lodged Agreed Order Modifying Bond
Jan. 31	66	ORDER (BJR) Setting oral argument on pending motions for 2/14/90 at 9:30 a.m. and continuing trial to 2/26/90
Feb. 1	67	NOTICE OF APPEARANCE of U.S. Senate to appear as Amicus Curiae

DATE	NR	PROCEEDINGS
Feb. 1	68	MOTION of Amicus U.S. Senate to exceed page limit. **Lodged Order to exceed page limit **Lodged Memorandum of Amicus U.S. Senate in support of constitutionality of Flag Protection Act
Feb. 2	69	AGREED ORDER (JWL) re: <i>Garza</i> modifying Bond ent & mld 2/2/90
Feb. 1	70	ORDER (BJR) for pmt of fees & expenses to John Mellen (\$604.20)
Feb. 2	71	MOTION govt's, to shorten time to hear mtn to file overlength brief (not noted) LODGED order re: #71
Feb. 2	72	MOTION govt's, to file overlength brief (noted 2/16/90) LODGED response to defendants' mtn to dismiss CtII LODGED response to defts' mtn to dismiss for outrageous government conduct
Feb. 5	73	ORDER (BJR) permitting overlength brief for amicus curiae U.S. Senate cc.c
Feb. 5	74	MEMORANDUM of U.S. Senate
Feb. 5	75	ORDER (BJR) shortening time to 2/5/90 mtn to permit government to file overlength briefs cc.c

DATE	NR	PROCEEDINGS
Feb. 5	77	RESPONSE govt's, to [defts'] mtn to dismiss Count II
Feb. 5	78	RESPONSE govt's, to defts' mtn to dismiss for outrageous govt conduct
Feb. 7	79	MOTION all defts', to file overlength reply brief (N 2/23/90)
Feb. 7	80	AFFIDAVIT of Kevin Peck in support of #79 LODGED reply brief LODGED order re: #79
Feb. 7	81	MOTION all defts', to shorten time re: #79 to 2/9/90
Feb. 7	82	AFFIDAVIT of Kevin Peck in support of #81 LODGED order re: #81
Feb. 7	83	AFFIDAVIT of mailing of #79-#84
Feb. 7	84	AFFIDAVIT of hand deliver of #79-#84
Feb. 9	85	ORDER (BJR) Motion to shorten time re: #79 is GRANTED. (cc:cnsI, BJR)
Feb. 9	86	ORDER (BJR) Motion to file reply brief in excess of 12 pages is GRANTED. (cc:cnsI, BJR)
Feb. 9	87	REPLY MEMORANDUM of defts. in support of motion to dismiss.
Feb. 13	88	OBJECTION of deft Strong to use of affidavits in lieu of evidentiary hearing

DATE	NR	PROCEEDINGS
Feb. 14	89	MINUTE ENTRY of hearing on defts' mtn to dismiss. Court hears argument & takes this matter under submission. Cnsl shall notify the court at the earliest possible date as to whether this matter will proceed to trial. Ent & cc 2/15
Feb. 14	90	PRAECIPE by counsel for defts <i>STONE</i> and <i>STRONG</i> requesting issuance of subpoenas in blank.
Feb. 15	91	TRANSCRIPT of proceedings held before BJR on 2/14/90 re: Motion to Dismiss.
Feb. 16	92	LETTER from counsel for deft. <i>GARZA</i> re: February 26, 1990 trial setting. (copy)
Feb. 21	93	MEMORANDUM DECISION (BJR) dismissing count II of the Information based on unconstitutionality of Flag Protection Act (cc: cnsI, BJR, USMO, USPO, J & O)
Feb. 21	94	ENT (BJR) Trial date is vacated pending resolution of appeal that govt advises court it will file re: order of 2/21/90. (cc: cnsI, Linda Carter)
Feb. 23	95	NOTICE OF APPEAL TO THE SUPREME COURT OF THE US by pltf #89-1434 US Govt from the order filed 2/21/90 Cert. of Svc. attached. (cc: BJR)

DATE	NR	PROCEEDINGS
Feb. 28	96	MOTION of deft <i>Haggerty</i> to amend conditions of Pretrial release, noted for 3/2/90
Feb. 28	97	AFFIDAVIT in support of #96
Feb. 28	98	MOTION of deft <i>Haggerty</i> to shorten time of #96 to 3/2
Feb. 28	99	AFFIDAVIT in support —Lodged Order re #96
Feb. 28	100	NOTICE OF Change of address of Charles Hamilton as atty for deft <i>Stone</i>
Feb. 28	101	ORDER (BJR) <i>denying</i> mtn to dismiss information on grounds of outrageous Govt conduct. Ent & cc
Mar. 1	102	MINUTE ORDER (JLW) that deft <i>Haggerty's</i> mtn to amend conditions of release is GRANTED and that the travel restriction is stricken. Ent & cc
Mar. 2	103	NOTICE OF CHANGE OF ADDRESS —for atty Charles Hamilton (Amended)
Mar. 19	***	RECEIVED from U.S. Supreme Court Notice of Filing an Appeal #89-1434, Oct. Term, 1989
Mar. 21	104	AMENDED MEMORANDUM DECISION dismissing count II of Information based on unconstitutionality of Flag Protection Act. (cc:cns1, BJR)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal No. 89-0419

UNITED STATES OF AMERICA

v.

SHAWN D. EICHMAN

[Filed: Oct. 31, 1989]

INFORMATION

The United States informs the court that:

On or about October 30, 1989, within the District of Columbia, SHAWN D. EICHMAN, did knowingly mutilate, deface, physically defile, burn, maintain on the floor or ground, and trample a flag of the United States.

(In violation of Title 18 U.S. Code, Section 700)

JAY B. STEPHENS
United States Attorney
District of Columbia

By: /s/ Craig Iscoe
CRAIG ISCOE
Assistant United States Attorney

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal No. 89-0420

UNITED STATES OF AMERICA

v.

DAVID GERALD BLALOCK

[Filed: Oct. 31, 1989]

INFORMATION

The United States informs the court that:

On or about October 30, 1989, within the District of Columbia, DAVID GERALD BLALOCK, did knowingly mutilate, deface, physically defile, burn, maintain on the floor or ground, and trample a flag of the United States.

(In violation of Title 18 U.S. Code, Section 700)

JAY B. STEPHENS
United States Attorney
District of Columbia

By: /s/ Craig Iscoe
CRAIG ISCOE
Assistant United States Attorney

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal No. 89-0421

UNITED STATES OF AMERICA

v.

SCOTT W. TYLER

[Filed: Oct. 31, 1989]

INFORMATION

The United States informs the court that:

On or about October 30, 1989, within the District of Columbia, SCOTT W. TYLER, did knowingly mutilate, deface, physically defile, burn, maintain on the floor or ground, and trample a flag of the United States.

(In violation of Title 18 U.S. Code, Section 700)

JAY B. STEPHENS
United States Attorney
District of Columbia

By: /s/ Craig Iscoe
CRAIG ISCOE
Assistant United States Attorney

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. CR89-315-R9

UNITED STATES OF AMERICA, PLAINTIFF

v.

MARK JOHN HAGGERTY, a/k/a ADEN XOULD,
CARLOS GARZA, COLIN STONE,
JOHN DOE NUMBER ONE, JOHN DOE NUMBER TWO,
JOHN DOE NUMBER THREE, and
JANE DOE, DEFENDANTS

[Filed: Nov. 28, 1989]

INFORMATION

The United States Attorney charges that:

COUNT I

On or about October 28, 1989, MARK JOHN HAGGERTY, a/k/a ADEN XOULD, COLIN STONE, JOHN DOE NUMBER ONE, JOHN DOE NUMBER TWO, JOHN DOE NUMBER THREE, and JANE DOE, did willfully injure or commit a depredation [sic] against property of the United States and an agency, thereof, to wit, a flag of the United States, which was the property of the United States Postal Service.

All in violation of Title 18, United States Code, Sections 1361 and 2.

COUNT II

On or about October 28, 1989, MARK JOHN HAGGERTY, a/k/a ADEN XOULD, COLIN STONE, JOHN DOE NUMBER ONE, JOHN DOE NUMBER TWO, JOHN DOE NUMBER THREE, and JANE DOE, did knowingly burn a flag of the United States, to wit, the flag of the United States, which was the property of the United States Postal Service.

All in violation of Title 18, United States Code, Sections 700(a)(1) and 2.

DATED THIS 28th day of November, 1989.

/s/ Mike McKay
MIKE MCKAY
United States Attorney

/s/ David E. Wilson
DAVID E. WILSON
Assistant United States Attorney

/s/ Kenneth R. Parker
KENNETH R. PARKER
Assistant United States Attorney

/s/ Robert G. Chadwell
ROBERT G. CHADWELL
Assistant United States Attorney

UNITED STATES ATTORNEY
3600 Seafirst Fifth Avenue Plaza
Seattle, WA 98104
(206) 442-7970

AFFIDAVIT

STATE OF WASHINGTON)

COUNTY OF KING)

STEVEN M. DEAN and STANLEY R. PILKEY, each being first duly sworn on oath, depose and say:

1. Each of your affiants is a federal law enforcement officer assigned to duty in Seattle, Washington. Special Agent Steven Dean has been employed by the Federal Bureau of Investigation for approximately eighteen (18) months. Postal Inspector Stan Pilkey has been employed by the United States Postal Inspection Service for approximately nineteen (19) years.

2. During the week of October 23, 1989, each of the affiants became aware that a protest to the recently enacted "flag burning" law was scheduled to be conducted in front of the United States Post Office at Broadway and Denny in Seattle, at midnight, on October 27, 1989.

3. Each of your affiants along with other F.B.I. agents and postal inspectors, were assigned to conduct surveillance of the protest because of the announced intention to burn a flag of the United States.

4. Your affiants were personally present at the protest and remained there for the duration of the event. Each was an eyewitness to the conduct described in this affidavit.

5. Postal Inspector John Buck was also present throughout the protest operating a video camera to record the event. Postal Inspector Buck produced a videotape which depicts portions of the protest. Your affiants have reviewed the videotape.

6. Your affiants also observed camera crews from various Seattle television stations filming the protests. Selected news broadcasts from KOMO, KING, and KIRO

have also been reviewed by your affiants. (A composite tape which consists of both the postal inspectors tape and the commercial news broadcasts is attached as Exhibit A.)

7. The protest began when individuals claiming to be Vietnam veterans burned a United States flag and numerous postage stamp-sized facsimiles of a United States flag.

8. Each of your affiants then became aware of an individual attempting to climb the flagpole at the United States Post Office building.

9. Special Agent Dean moved to one edge of the crowd which had gathered around the base of the flagpole. Postal Inspectors Pilkey and Buck moved to the other side of the crowd.

10. Each of your affiants observed the flag being lowered to ground level. Once the flag was in reach of the crowd, individuals began to set the flag on fire.

11. Your affiants observed seven (7) separate individuals participating in burning the United States flag from the Post Office. The burning began approximately 12:10 p.m., on October 28, 1989.

Mark John Haggerty, a/k/a Aden Xould

12. Your affiants observed a young white male wearing a predominantly green tie-dyed tee shirt setting fire to the flag.

13. This same individual was observed standing at the corner of the Post Office as others set fire to the flag.

14. This individual then participated in running the burning flag back up the flagpole.

15. Special Agent Dean has met this individual and identified him as Mark John Haggerty. Special Agent Dean has also learned that Haggerty also uses the name Aden Xould.

Carlos Garza

16. Your affiants observed a dark-haired white male with Hispanic features setting the same United States flag afire. This individual helped raise the burning flag up the flagpole.

17. This individual was approximately five (5) feet seven (7) inches tall, with short dark hair. He had no moustache or beard and was wearing a grey sweater with a design in the shoulder and chest area. He appeared to be in his mid-twenties.

18. This individual provided the name of Carlos Garza to a member of the staff of the Tacoma News Tribune.

19. This individual is shown on Exhibit A. Stillprints of the individual are attached as Exhibit B.

Colin Stone

20. Your affiants observed a tall white male throwing a flammable liquid from a container labeled "Napalm" onto the flag and setting fire to the same United States flag.

21. This individual was dressed in black leather jacket with numerous metal studs around the collar and cuffs and an Iron Cross insignia on the left shoulder. The individual's head appeared to have been shaved on the sides with hair left on the top of his head in a quasi-Mohawk style. The individual had a small ponytail style clump of hair on the back of his head. He had an earring in the left ear. He appeared to be in his early twenties.

22. This individual is shown on Exhibit A. Stillprints of the individual are attached as Exhibit C.

John Doe Number One

23. Your affiants observed a thinly built male with long dark hair setting fire to the same United States flag.

24. This individual was wearing a dark colored hat with a light colored hatband. The individual was also wearing a dark colored coat. The individual did not have a moustache or a beard. He appeared to be in his mid-twenties.

25. This individual is shown on Exhibit A. Stillprints of the individual are attached as Exhibit D.

John Doe Number Two

26. Your affiants observed an individual carrying a flag somewhat similar to a United States flag, set fire to the same United States flag.

27. This individual had long dark hair, a moustache, and a long beard. The individual was medium height and build. He wore a dark colored hat with a hatband which had a light colored sinuous design. He appeared to be in his late twenties or early thirties.

28. This individual is shown on Exhibit A. A stillprint of the individual is attached as Exhibit E.

John Doe Number Three

29. Your affiants observed a well-dressed, middle-aged white male with a stocky build setting fire to the same United States flag.

30. This individual has dark hair, with neatly trimmed moustache and beard. This individual wore glasses. He was wearing a thigh-length tan-colored, single-breasted coat.

31. This individual is shown on Exhibit A. Stillprints of the individual are attached as Exhibit F.

Jane Doe

32. Your affiants observed a young white female in her early twenties with medium length brown hair setting fire to the same United States flag.

33. This individual wore a blue sweater over a white turtleneck and light-colored pants. She was approximately five and one-half (5-1/2) feet tall with a medium build.

34. This individual is shown on Exhibit A. Stillprints of the individual are attached as Exhibit G.

35. After the flag was engulfed in flames, it was hauled back up the flagpole and left to burn.

36. The flag was totally destroyed with the exception of a small segment of the border.

37. The flag was the property of the United States Postal Service, an agency of the United States, and the remaining segment of the flag is so imprinted.

/s/ Steven Dean
STEVEN DEAN, Special Agent
Federal Bureau of Investigation

/s/ Stan Pilkey
STAN PILKEY, Postal Inspector
U.S. Postal Inspection Service

SUBSCRIBED and SWORN before me this 28 day of November 1989, by Steven Dean and Stan Pilkey.

/s/ John L. Weinberg
JOHN L. WEINBERG
United States Magistrate

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal Nos. 89-0419/420/421 JLG

UNITED STATES OF AMERICA

v.

SHAWN D. EICHMAN, ~~ET~~ AL., DEFENDANTS

[Filed: Dec. 5, 1989]

MOTION TO DISMISS

Defendants Shawn Eichman, David Blalock, and Scott Tyler hereby jointly move, pursuant to Fed.R.Crim. P. Rule 12(b), to dismiss the informations filed against them. The grounds for defendants' motion are set forth in the accompanying Memorandum of Law.

Respectfully submitted,

/s/ David Cole
DAVID COLE
Center for Constitutional Rights
666 Broadway - 7th Floor
NY, NY 10012
(212) 614-6464

/s/ William Kunstler

WILLIAM KUNSTLER

RONALD KUBY

13 Gay Street

NY, NY 10014

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NINA KRAUT

3815 Yuma St., NW

Washington, D.C. 20016

(202) 745-0300

D.C. Bar No. 34815

INCIDENT REPORT OF OFFICER CREEL

[Dated: Oct. 30, 1989]

STATEMENT OF FACTS:

On Monday Oct. 30, 1989, at approximately 1200 pm, a group of individuals opposed to the "Flag Protection Act of 1989" walked to the East Center Steps to the U.S. Capitol Building closely followed by a large contingent of news media. At more than one location on the East Center Steps, four (4) individuals in this group removed flags of the United States and ignited or attempted to ignite them, apparently by means of butane cigarette lighters [sic] and/or matches. According to the text of a prepared statement which other members of this group were distributing in connection with this activity, these acts were undertaken in order to challenge the newly enacted flag protection provisions. The ignited flags were either entirely or partially consumed by the rapidly spreading flames. At approximately 12:02 pm., the four (4) individuals involved in this activity were placed under arrest and charged with violating the "Flag Protection Act of 1989" [P.L. 101-131, amending Title 18, Section 700(a) of the U.S. Code], "Demonstrating Without A Permit," in violation of Section 153 of the Traffic and Motor Vehicle Reg. for the United States Capitol Grounds, and "Disorderly Conduct," in violation of D.C. Code Section 22-1121. [Blalock] was read his rights, searched incident to arrest, and transported to 119 D St., N.E. for processing.

INCIDENT REPORT OF OFFICER MILLHAM**[Dated: Oct. 30, 1989]****STATEMENT OF FACTS:**

On Monday, October 30, 1989, at approximately 12:00 PM, a group of individuals opposed to the "Flag Protection Act of 1989" walked to the East Center Steps to the U.S. Capital Building closely followed by a large contingent of the news media. At more than one location on the East Center Steps, four (4) individuals in this group removed flags of the United States and ignited or attempted to ignite them, apparently by means of butane cigarette lighters and/or matches. According to the text of a prepared statement which other members of this group were distributing in connection with this activity, these acts were undertaken in order to challenge the newly enacted flag protection provisions. The ignited flags were either entirely or partially consumed by the rapidly spreading flames. At approximately 12:02 PM, the four (4) individuals involved in this activity were placed under arrest and charged with violating the "Flag Protection Act of 1989" P.L. 101-131, amending title 18, section 700(a) of the U.S. Code. "Demonstrating Without A Permit" in violation of section 153 of the *Traffic and Motor Vehicle Regulations for the United States Capitol Grounds*, and "Disorderly Conduct," in violation of D.C. Code Section 22-1121.

INCIDENT REPORT OF OFFICER MILLHAM**[Dated: Oct. 30, 1989]****STATEMENT OF FACTS:**

On Monday, October 30, 1989, at approximately 12:00 PM, a group of individuals opposed to the "Flag Protection Act of 1989" walked to the East Center Steps to the U.S. Capital Building closely followed by a large contingent of the news media. At more than one location on the East Center Steps, four (4) individuals in this group removed flags of the United States and ignited or attempted to ignite them, apparently by means of butane cigarette lighters and/or matches. According to the text of a prepared statement which other members of this group were distributing in connection with this activity, these acts were undertaken in order to challenge the newly enacted flag protection provisions. The ignited flags were either entirely or partially consumed by the rapidly spreading flames. At approximately 12:02 PM, the four (4) individuals involved in this activity were placed under arrest and charged with violating the "Flag Protection Act of 1989" P.L. 101-131, amending title 18, section 700(a) of the U.S. Code, "Demonstrating Without A Permit" in violation of section 153 of the *Traffic and Motor Vehicle Regulations for the United States Capitol Grounds*, and "Disorderly Conduct," in violation of D.C. Code Section 22-1121.

Subject searched prior to incident to arrest and transported to 119 D St. NW, Washington, D.C. for processing.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal No. 89-419 JLG

UNITED STATES OF AMERICA

v.

SHAWN E. EICHMAN

[Filed: Dec. 5, 1989]

DECLARATION OF SHAWN D. EICHMAN

Shawn D. Eichman, hereby declares, under penalty of perjury, as follows:

1. I am a defendant in this action. I submit this declaration to explain what I intended to communicate in burning the flag for which I have been charged. I mounted the steps of the Capitol on October 30, 1989, and burned a flag for many reasons, to protest the enforced patriotism represented by Flag Protection Act, and as a woman, to protest the government's blatant war on women and increased restrictions on civil and human rights.

2. I refuse to obey a law giving the flag more protection than the people, and refuse to allow the President to amend the constitution to give the flag equal rights, but not women.

3. I see the specter of fascism in this attempt to force patriotism, with the added insult of forced reproduction, and the injury of forced sterilization.

4. When Hitler came to power in Germany, a major theme in government became linking the role of women

with the strengthening of the nation. Abortion and homosexuality became immoral crimes against the state, and laws were passed to force patriotism to the swastika, to force motherhood, and to force sterilization of "unfits." A national "guilt trip" was placed on women to push them out of the work force, and into the cannon fodder business.

5. Today, women are guilt tripped for wanting control of their own destiny and bodies. Abortion and homosexuality are criminalized, and women considered "unfit" (Native American and Puerto Rican women especially) are routinely sterilized by government sponsored clinics, with government encouragement.

6. The christian fascists, and morality police (brown-shirts for the President, Congress, and the Supreme Court), have launched a misogynist offensive of "national renewal" to put women in their place, and a flag in every household.

7. Confiscated from me on October 30 was a red, white, and blue maternity bra which I intended to burn in protest while standing on a flag. I submit this as evidence against the state for the murder of thousands of women by rape, back alley abortions, discrimination, and sexism sponsored by this imperialist and patriarchal empire.

8. Also confiscated was a flag signed by visitors of a flag art show (now illegal), who share my interpretation of the flag. I submit this as evidence against the state for their attempt to mask the crimes committed under this flag with forced patriotism.

9. I find the U.S. government in *contempt* of the rest of the world for economic exploitation, and capitalistic plunder.

10. The U.S. has exhibited blatant disregard for the environment, and for the people of the world, to whom the flag is an international symbol of oppression and

murder. The flag waves over open trade with the apartheid government of South Africa. The flag funds Salvadoran Death Squads as they murder for democracy. The flag flies over U.S. intervention in Nicaragua, Peru, Columbia, Korea. The flag flew as American soldiers raped and murdered children, parents, neighbors, and families in Vietnam.

11. Some say President Bush is guilty of his own "Flag Protection Act" for defiling the flag by wrapping himself in it. I think it's no surprise since this flag represents the interest of the bourgeoisie and imperialist patriarchy. It's only fitting that he wrap himself in this flag of capitalism while passing down death sentences to women already victimized by rape and incest, Black youth victimized by poverty, victims of AIDS, and homeless victims of capitalism.

12. He hypocritically denounces the suppression of political dissent in other countries while outlawing it in the U.S., and declares a police state on striking coal miners, while smiling at Solidarity in Poland.

13. Yes, I've burned flags. It was my intention to send a direct message to the government and internationally, to transcend language barriers, and in a single symbolic act, to indict the government for its participation and promotion in world oppression.

14. If I had stood there on the steps and shouted in anger, my voice would have been limited to those within earshot who spoke English. I chose a form of symbolic political speech, flag burning, to tell the world that this system will know no peace while people are suffering.

15. My message was spread through the media to the eyes of the people of the world. It is to them that I will hold myself accountable.

16. I cannot be quiet, or utilize less effective means of communicating dissent, when a woman is raped every six

minutes, Black people are killed for walking down the wrong streets, and homeless people and people with AIDS starve and die in front of vacant city owned buildings.

17. I have burned a flag, but I have committed no crime. The real criminal in this case is the United States government for cloaking their murderous crimes in forced patriotism.

18. The people of the U.S. have delivered *their* verdict. On July 3rd, (in response to the *Webster* decision), and on October 28th, when this fascist Flag Protection Act went into effect, flags burned across the country.

19. The people of the world have delivered their verdict as well, and flags will continue to burn internationally, wherever U.S. intervention and exploitation is opposed.

20. The government has made it a crime to express strong political dissent against its symbols. To the oppressed, burning the flag is a celebration!

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

/s/ Shawn D. Eichman
SHAWN D. EICHMAN

Dated: 12-1-89

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal No. 89-420 JLG
UNITED STATES OF AMERICA

v.

DAVID GERALD BLALOCK

[Filed: Dec. 5, 1989]

DECLARATION OF DAVID GERALD BLALOCK

DAVID GERALD BLALOCK, hereby declares, under penalty of perjury, as follows:

1. On October 30, 1989, I knowingly and intentionally set an American flag on fire on the front steps of the U.S. Capitol [*sic*]. I was joined in this act by my co-defendants, Shawn Eichman and Dred Scott Tyler, as well as by Gregory Lee "Joey" Johnson. We notified the press in order to amplify the message. At the same time that we burned the flag, we circulated the statement attached hereto as Addendum A.

2. For me, burning the flag of the United States was an act of deeply-felt moral conviction, growing out of the days in which I fought in an immoral and obscene war started, maintained, and directed by another generation of flag wavers.

3. As a kid, I believed in the American flag. I grew up in the coal mine-steel mill region of western Pennsylvania. From kindergarten through high school I was thoroughly indoctrinated in patriotism with the daily ritualistic Pledge

of Allegiance to the Flag and a steady diet of John Wayne war movies.

4. In 1968, I joined the Army. It was the traditional thing to do, to serve my country, carry high its flag, and blindly go with the flow. I asked no questions. Patriotism was enough of a reason.

5. I volunteered for duty in Vietnam and served there in 1969 and 1970. I received several medals for my military service, including the National Defense Service Medal, the Vietnam Service Medal, and the Vietnam Campaign Medal.

6. From my first days of basic training at Fort Jackson, South Carolina, the American flag hung over every aspect of my military education. It flew over the buildings where Army instructors taught me that Asian people were sub-human, to be known only as "slopes," "slant eyes" or "gooks." "Old Glory" flapped in the breeze above the bayonet training area where I spent hours stabbing yellow skinned silhouettes while shouting "kill, kill, kill without mercy." I remember the Flag flying ominously above the Fort Jackson stockade as a reminder that if I didn't go along with the game plan, the Army would jail me for 6 months of hard labor.

7. I arrived in Vietnam in February 1969. When I stepped off the plane at Bien Hoa Airbase, the American Flag hung drooping in the stifling hot air, which carried the stench of napalmed burning human flesh.

8. The Flag flew above the Replacement Battalion at Long Binh where I was processed and assigned to another base camp. At that point the flag reminded me of basic training and the bayonet practice. "Kill, kill, kill without mercy." Any skepticism on my part toward carrying out my duty was quickly dispelled as I went by the large military prison known as L.B.J. (Long Binh Jail). There the American Flag hung onerously above a large number

of incarcerated American soldiers who refused to take part in the American death machine.

9. The "Red, White and Blue" flew above the small base camp that I was assigned to in Vietnam. But there I discovered that most of my fellow soldiers were opposed to the war — opposed the killing, the brutality, the destruction of someone else's country. Despite the threat of imprisonment, I gathered courage from their opposition and joined with it. Even with the widespread resistance of American soldiers on the ground, the death machine continued to operate. It came mainly from the air, but was still blessed by the American Flag and anointed with patriotism.

10. When I returned to the United States I still had time to serve in the Army. I was assigned to Fort Rucker, Alabama, where I participated with hundreds of other GI's and students in an anti-war protest. Because of my participation, an officer who stood beneath the flag ordered me transferred to another base. I was sent to Fort McClellan, Alabama. There I joined a large number of enlisted persons who functioned as an organized anti-war group. We held meetings, published a newspaper, and organized opposition to our government's death and destruction in Vietnam. Patriotic army officers, blessed by the "Red, White and Blue," did everything in their power to silence us.

11. Upon discharge from the army, I joined an organization known as Vietnam Veterans Against the War. In April 1973, a "Home with Honor" parade was held in New York City. The only organized political group of Vietnam vets who participated in the parade marched in the Vietnam Veterans Against the War contingent behind the banner "No Honor Here, No Honor There." I can remember the American flag very distinctly at this parade. Our group received thunderous applause and cheers from the spec-

tators along most of the march, until we reached the reviewing stand. There, a handful of flag-waving spectators booed and spit on us, and the officers and dignitaries on the reviewing stand turned their backs on us. The only time in my life as a veteran that I was spit on and insulted was by flag-waving patriots.

12. These people symbolized only what government officials did for the Flag behind the scenes. Like all other anti-war protesters, our activities were the target of a concerted government effort to disrupt, discredit and "neutralize" constitutionally-protected protest activities. The FBI agents and COINTELPRO operatives who violated my so-called constitutional rights did so under the flag and the government for which it stands.

13. An entire generation has passed since the Vietnam War. The United States government continues to support fascism abroad and repression at home. Every bullet that kills a Nicaraguan peasant, every bayonet that stabs a Salvadoran priest, every cluster bomb that maims a Palestinian child was provided by men and women who wave the flag.

14. I burned the flag of the United States as a vow, two decades after Vietnam, that I will continue to fight against the imperialism and racism that brought death and destruction to the people of Vietnam, and that continues to bring death and destruction to the people of Nicaragua, El Salvador and many other places around the world.

15. I felt that burning the Flag is a vital and indispensable means by which to communicate this message. The act of flag burning is a dramatic and total rejection of forced patriotism and the corruption that it conceals. It is an act clearly understood by all the world's people.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief.

/s/ David Gerald Blalock
DAVID GERALD BLALOCK

Dated: 11-28-89

ADDENDUM A

STATEMENT BY THOSE CHALLENGING THE "FLAG PROTECTION ACT OF 1989"

October 30, 1989—12 Noon, Steps of the U.S. Capitol

At midnight this past Friday, October 27, the new national flag statute went into effect, outlawing desecration of the U.S. flag. This law demands punishment of up to a year in jail and a \$1,000 fine for anyone who "knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon any flag of the United States." These dangerous moves to shut people up and shut people down in the name of the red, white and blue are not in the interest of the majority. Today, they try to suppress political expression in the name of the flag, tomorrow what next will become forbidden. We need onlylook at Nazi Germany to see an answer to that.

At midnight this past Friday, the flag law went into effect. At one minute past midnight hundreds of people across the country delivered their judgment on that law, expressing themselves as so many have already done around the world. Over 1,000 U.S. flags were barbecued, napalmed, torched, set ablaze and properly displayed. The people who did this were diverse in their backgrounds, had different reasons for acting, and hold many different views toward the meaning of the flag itself. But especially in a political climate marked by increasing racism, assaults on womens' rights, calls for an enforced oppressive moral code, censorship, intervention in other countries and overall escalating attacks on the people, all deeply felt the need to defy a law that would make the flag a religious icon and its worship mandatory. The government would have liked its new law to go down easy, the people are not going to make it easy for them.

We are among those who acted that night, and we intend to continue that protest here today, and express ourselves on this question. To the government that has made flag desecration illegal, we defy your law. And we challenge you. Arrest us. Test your statute. Take it back to your Supreme Court and try once again to claim it is consistent with your constitutional standards of free speech. Go ahead and try to argue some more for an amendment. But check this out. You will have a problem. As you editorialize on the sanctity of free speech, denouncing the suppression of dissent in other countries you will be silencing it here, provoking questions when you need obedience, opposition when you expect compliance, and millions upon millions more will come to understand what is really going down, that this effort to ban flag desecration is not really about adding some legal asbestos to a piece of cloth, but rather the forceful suppression of political dissent as part of a much larger and vicious agenda. And the people will oppose you.

To all those watching and listening today, here and around the word, we say this. The battle lines are drawn. On one side stands the government and all those in favor of compulsory patriotism and enforced rever[e]nce to the flag. On the other side are all those opposed to this. And to all the oppressed we have this to say also. This flag means one thing to the powers that be and something else to all of us. Everything bad this system has done and continues to do to people all over the world has been done under this flag. No law, no amendment will change it, cover it up, or stifle *[sic]* that truth. So to you we say, Express yourself! Burn this flag. It's quick, it's easy, it may not be the law, but it's the right thing to do.

FIGHT THE FACIST FLAG LAW

NO FLAG AMENDMENT

NO MANDATORY PATRIOTISM

Dave Blalock, Vietnam Veterans Against the War (Anti-Imperialist)

Shawn Eichman, Coalition Opposed to Censorship in the Arts

Joey Johnson, Revolutionary Communist Youth Brigade

Dread Scott, revolutionary artist

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal No. 89-421 JLG

UNITED STATES OF AMERICA

v.

SCOTT W. TYLER

[Filed: Dec. 5, 1989]

DECLARATION OF SCOTT W. TYLER

SCOTT W. TYLER, aka "DREAD SCOTT," declares as follows:

1. I am a Chicago based revolutionary artist, and a defendant in this action.
2. On October 30, 1989 I burned an American flag on the steps of the United States Capitol. Gregory Lee "Joey" Johnson, defendant in *Texas v. Johnson*, Shawn Eichman, a revolutionary artist, and Dave Blalock, a Vietnam Vet, joined me in this action as well. We chanted "Burn Baby Burn," amongst other things, as America's "holy icon" went up in smoke. Now the suckers who run this system have dragged us to court, or at least some of us.
3. My reason for burning the flag was highly political and intentional. Why would I burn a U.S. flag? From the standpoint of the people of the world, this flag represents nothing but hundreds of years of brutal oppression. Perhaps a better question would be "Why wouldn't people want to burn their flag?" The real question is "What right

do they have to suggest that their whole empire should continue to be allowed to exist, let alone think that their bloody flag should be (or could even be) protected by some legal asbestos?"

4. The system has passed new repressive "flag desecration" laws on the local, State, and federal level which outlaw antipatriotic dissent, which compel respect for the flag, and which attempt to make patriotism the order of the day. In fact, part of the wording of the very law which I am now accused of violating, the part which reads "maintains on the floor or ground," was written in direct response to my art. The city of Chicago dragged me and nine other artists to court to prevent us from displaying our art, all of which had flags in it. They attempted to get a ruling that their newly enacted city ordinance, which was written in direct response to and which outlawed my artwork, "What is the Proper Way to Display a U.S. Flag?," was constitutional. Would that not have been reason enough to protest?

5. "What is the Proper Way to Display a U.S. Flag?," which was displayed at the School of the Art Institute of Chicago in February and March 1989, is a photographically based installation for audience participation. It concentrates the hopes, joys, aspirations, and ideology of the oppressed. It consists of a 16" x 20" photomontage which combines a picture of several South Koreans burning a U.S. flag holding a sign which states "Yankee go home son of bitch," and a picture of several coffins draped in American flags. The title, "What is the Proper Way to Display a U.S. Flag?," is also printed on this photomontage. Below this is a shelf with ledger books in which viewers may respond to this question. And below that is an American flag spread on the floor. Audience participation, including but not limited to writing comments in the ledger book and/or walking on the flag, is an essential and

integral part of the art work. During its display at the School of the Art Institute of Chicago, and at a recent show in New York, thousands of people participated with the piece, "trampling" on the flag and writing comments in the ledger books. This piece made many people question and brought many into opposition to this system and the laws which are now enshrining the flag. This work may now be illegal because of this law. Would this not be reason enough?

6. In response to the display of my artwork in Chicago, 2500 VFW and other reactionary vets attempted to suppress my art. I received death threats from Marines, policemen and good life loving rednecks, because I dared make art which questioned and challenged their system. Bomb threats were phoned into the School of the Art Institute. The Chicago Park District threatened to cut funding from all museums (\$28 million) until the school explained its action. The State cut Illinois Art Council funding of the School and the Illinois Arts Alliance to \$1 because they wouldn't capitulate and either remove or condemn my artwork. All of this has definitely reaffirmed my contempt for this system and is reason enough to barbecue O'l Glory.

7. The reactions of the thousands of people who interacted with my artwork show the extreme divergence of viewpoints on patriotism and this flag. They demonstrate just how deep a social question the flag poses at this time, one which is and must continue to be broadly debated. And they reveal that there are many people who despise the flag and everything it represents. Below is a sampling of their comments:

To Dread Scott and all other shit-for-brains liberals: God Guns and Guts made this nation, and for assholes like yourself to desecrate our American flag is not even worth describing. — a Marine

Let it burn, Let it burn, Let the Fucker Burn, Burn, Burn. The first time I had to confront the flag was in Vietnam — Black GI's in my unit refused to stand & salute it. After much debate and anguish I did the same. The second time was when I found Marine Vets burning the Flag in anger. Finally I had to understand why youth carried the Viet Cong flag in support of the Vietnamese were right and deserved to Win! Since then I've seen it burned all over the world and I welcome it. The U.S. deserved to be defeated in Vietnam and deserves the same around the world. Joe Urgo Viet Vet — 1968

Go fuck yourself Dread Scott Tyler. You are lucky to be living in this country. (See you in hell) — Chicago Police Officer

That goes double for me asshole — Chicago Police Officer

Art for the people by the people with the people insight the people against the people agitate the people scare the people make the people think instead of being the lemmings the people usually are — Dread Scott you done all that. Thank You.

I used to believe in the freedom of expression that the United States stood for; equality, harmony, peace. Now people want to kill Scott. Enough said, sad world.

In Russia you would be shot, and your family would have to pay for the bullets. But once again what do you expect from a nigger named "Dread Scott"?

I understand your disappointment with the USA and can only imagine the bitterness you must feel toward this country. Therefore, I understand you desire to see the flag on the floor. I hope that your exhibit will help the other segment (the one who want the flag to

fly) look into your reason. Personally, I am a white male so I'm standing off to the side while writing this page. Best of luck Mr. Tyler. signed from Seattle, Washington

Brother you have provoked "white supremacy" to reveal itself and that is a very special mission and reveals your special role in our "victory" over the murders of — millions of Native Americans — Mexicans — Central Americans — and especially Africans, Hampton and Clark, Malcolm X, Martin Luther King, Jr., Marcus Garvey, and thousands of other revolutionaries they have sought to silence in their Satanic attempt to overthrow "righteousness." Thank you Brother

Freedom of expression forever

Your're an ignorant ass

This Shit ain't art

Right now a lady is on the ground crying because of what you have done. I feel you did something wrong and I feel you should be put in jail or have something done to you for this. I love my country and it hurts me to know that you don't. I hope you feel good about yourself for what you are putting people through. You're an asshole.

Dear Dread, Like someone who viewed the exhibit, I began reading other people's comments standing next to the flag, but gradually moved to standing on it. As someone raised to be iconoclastic (at least I thought I was) it was an interesting moment of self-awareness, which (I think) is the whole purpose of your display. Perhaps when human life and liberty is really valued above property (and symbols) in America, we will all have more respect for "the flag" — but first we need allegiance to the principles of "liberty and justice for

all." Congratulations on your courage in getting arrested this weekend to test this crazy law. P.S. Kudos also to the gallery for their courage.

Why is it okay to "knowingly maintain on the ground" homeless *people* but not the "flag"???

I am a German girl. If we Germans would admire our flag as you all do, we would be called Nazis again. I think you do have too much trouble about this flag.

While viewing this exhibit, a 97-year-old man read some thoughts he sent for the occasion — how men have died for this flag and so on. While I can deeply feel his grief for the desecrating he perceives in this exhibit, he also said something very disturbing . . . "If you are an American, you will feel this way too." Patriotism may be expressed in (many) ways. Such a myopic view leads to trouble. As my good friend and champion of the rights of the people (Arthur Kinoy) once said to me, "when fascism comes to America it will be wrapped in the American flag."

Hi, the flag is now folded on the shelf. I have the right to unfold it, but the veterans are here and I'm afraid to. Is it right (is it American?) for me to feel afraid to exercise my rights?

I think it should be burned and gone off this world — age 12

I think the "artist" should be returned to his heritage, i.e., jungles of Africa, and then he can shovel manure in his artistic way.

This flag I'm standing on stands for everything oppressive in this system — The murder of the Indians and all the oppressed around the world, including my brother, who was shot by a pig who kicked his body over to "make sure the nigger was dead." This pig was

wearing the flag. Thank you Dred Scott for this opportunity.

Would it not be reason enough to burn the flag because of the myopic, deadly, and repressive views and actions called for by some of these participants? Or would it not have been reason enough because others still are demanding an end to the very oppression spouted forth by them? (It may even be said that I was answering my own question, the question raised by my art, when I burned the flag at the Capitol, for my own answer may have been, "Burn the sucker. Burn it early, Burn it often. The moment they try to further repress people, burn it in their face, burn it on the steps of their Capitol.")

8. If we had burned the flag in solidarity with the Vietnam vets who 'napalmed' 1001 flags in Seattle one minute after the 'Flag Protection Act' went into effect, that would have been reason enough. Had we burned the flag in solidarity with the thousands of outraged women who demonstrated the day after the repressive *Webster v. Reproductive Health Services* decision, many of whom set the flag ablaze, that would have been reason enough. Had we burned the flag in solidarity with people around the world who know what this empire and its flag really represent, and consequently, target their Yankee oppressor and burn his flag the moment they rebel, that would have been reason enough.

9. It would have been reason enough to roast Ol' Glory because of the 50 million Blacks who were murdered by this state during the times of slavery. It would have been reason enough because of the original *Dred Scott* decision, in which the "democratic and freedom loving" court, in complete accordance with "all men are created equal," ruled that there are no rights that a black man has which a white man is bound to respect. It would have been reason enough that 130 years later, this "land of freedom"

has the highest per capita incarceration rate of anywhere in the world, higher even than South Africa, and the number of incarcerated Blacks per capita is much higher than that of whites. (Will I now add to that statistic?)

10. The rape, pillage and plunder of the Native American people and land, and the country's genocidal arrogance in making a holiday and children's game, not to mention hundred of "westerns," to celebrate that atrocity, would have been reason enough.

11. The fact that: 1 in 4 women is raped in this country; that 40% of homicides against women are by their husbands or lovers; that every 15 seconds a woman is beaten; that this country and its courts are driving women further and further down in a variety of ways, including, but certainly not limited to, the restrictions on abortions, would certainly be reason enough. (We are supposed to let the state and a feudal Christian god control women's bodies and lives?)

12. The country's wars, from Vietnam to Korea, to Nicaragua, to El Salvador, to World War II (yes even WW II), to all the other unnamed wars, police actions, conflicts, etc., designed to maintain and expand the empire, would have been reason enough. The brutal dictatorial regimes which the United States supports politically, militarily, and economically: South Africa, El Salvador, Mexico, Guatemala, Israel, Iran (we haven't forgotten the Shah), Columbia, Peru . . . would have been reason enough. The real and deadly plans and preparations for nuclear war, which have not stopped despite all the 'peace mongering' with Soviet rivals, would be reason enough.

13. The "war on drugs" which is a cover for an escalating war on the people, would have been reason enough. The daily degradation and oppression of Black people and other oppressed minorities: the murder of Yusef Hawkins in Brooklyn for the crime of being in the wrong neighbor-

hood, the murder of Leonard Banister by a pig looking for "drugs" (better to murder him in cold blood than to let him corrupt his life with drugs), Eleanor Bumpers, Michael Stewart, Cedric Saniford and the countless other "faceless" people wasted by this land of liberty. The sweat shops, the ghettos. La Migra. AIDS. Repression. Religion. Hypocrisy. Censorship. Racism. Sexism, capitalism, imperialism, nationalism, patriotism, fascism. All of this is more (much much more) than reason enough to make revolution and end 'the American era,' let alone burn its sacred icon.

14. I am a revolutionary and a proletarian internationalist. Burning the American flag is a statement which is recognized and understood around the world. I, and many others wish to show our solidarity with the people of the world, and consider our political activity here a part of the international struggle against imperialism. It is impossible to fully combat imperialism, particularly U.S. imperialism, while still upholding any shred of Amerika or its holy icon. As the oppressed know, "You can't beat the enemy while still upholding his flag." This alone would be justification for burning many U.S. flags.

15. So yes, I burned the flag. I burned it for all the reasons and to protest all the wrongs listed above and many many more far too numerous to list. Somebody had to do it. This system is totally unacceptable. I burned the flag on the steps of the Capitol two days after the repressive new law went into effect, because the government was too cowardly and politically defeated to arrest me and the hundreds of others who burned the flag one minute after the law went into effect. (After all it doesn't play well on the nightly news to announce that one minute after the land of freedom and democracy passes a new law, the people have passed their verdict — "Fuck the flag and the new law!"). I burned it to say that there is a way to take those

bastards on, that there are many in this country who are opposed to this whole system, and that we don't have to sit silently by as the State further prepares the legal, political, and ideological machinery for fascism. I particularly wanted this message to play loud and clear to young people, who may have born under this system and its flag, but are looking for ways to ensure that they don't have to die under it. Hopefully many have been inspired by our action on the steps of the Capitol and the seeds of resistance will be magnified a thousand fold in the future.

16. I burned the flag to say, as the popular reggae song goes, referring to the "downpressors," "Deep in my heart I abhor you." Would not that alone have been reason enough?

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

/s/ Scott W. Tyler
SCOTT W. TYLER

Dated: 12-1-89

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal Nos. 89-419/420/421JLG

UNITED STATES OF AMERICA

v.

SHAWN E. EICHMAN, ET AL., DEFENDANTS

[Filed: Dec. 5, 1989]

DECLARATION OF GREGORY LEE JOHNSON

Gregory Lee Johnson, hereby declares, under penalty of perjury, as follows:

1. I am a resident of New York, and I was the defendant in *Texas v. Johnson*, 109 S. Ct. 2533 (1989). On October 30, 1989, I knowingly and intentionally set an American flag on fire on the front steps of the U.S. Capitol. I was joined in this act by Shawn Eichman, Dread Scott Tyler and David Blalock, the defendants in this action. The government initially arrested and charged me along with the other three defendants, but chose not to file an information against me.

2. Our action of burning the flag of the United States was done to express unity with the most strongly held convictions and dreams of millions of oppressed people throughout the world. In El Salvador, the oppressed have burned the American flag and an effigy of Uncle Sam because over 70,000 people have been murdered in the last ten years by U.S. trained and equipped death squads and

aerial bombardment of villages by bombs with American flags and "Made in the U.S.A." stenciled on their sides. In Haiti, when the workers who slave in the factories of American imperialism pour into the streets to fight against the junta, they burn the flag of U.S. imperialism, the junta backers. From South Korea to Peru to Palestine to South Africa, Panama, Mexico, Honduras and all over the world one of the first things that happens when oppressed people rise up and they want to make a powerful statement of their hatred and contempt for all the U.S. backed misery and starvation and famine in the world and for all the vicious regimes created and nurtured by U.S. imperialism, one of the first things they do is burn the American flag.

3. I am a member of the Revolutionary Communist Youth Brigade and to us burning the flag is important as a powerful political statement to be made by the oppressed within the borders of the U.S., for whom for millions and millions the American dream has been an American nightmare. This is the flag that flew over the genocide of Native Americans from the 7th Calvary's massacre of the Sioux Indians at Wounded Knee right down to the continued oppression of these people today on the reservation system. This is the flag that flew over the theft of over half of Mexico's land. This is the flag that flew from the sterns of slaveships bringing captive in chains millions of Black people to this country's bloodied shores right down to the modern day oppression of Black people being held captive in the inner city ghettos of the U.S. That is also the depraved history of the American flag.

4. We in the Revolutionary Communist Youth Brigade are gravediggers for imperialism as part of bringing a whole new future into existence that isn't based on exploitation and domination. Our allegiance is not to the

red, white and blue symbol of plunder. Our allegiance is to the oppressed people of the world. To us, burning the American flag is a living expression of proletarian internationalism. We don't respect these borders and divisions imperialism put between us. Burning the American flag is a revolutionary manifesto to the people of the world that here in the U.S., within the belly of the beast, there is a revolutionary people who knows that there is a world imperialist system that is the common enemy of the people whether they reside in the imperialist countries or in the oppressed third world countries. Burning the American flag in the U.S. is a real living part of politically challenging the oppressed here to see the world in a class conscious internationalist outlook, to welcome every defeat and setback suffered by our own rulers, and to politically utilize those defeats to hasten the day when we can not only burn the symbol of the empire, but bring the empire itself down by revolution.

5. Finally I want to say that I believe that we live in a sick and dying empire that is desperately clutching at its symbols. The same Emperor Bush and Congress that has this fascist fascination for the flag and is desperately working to enforce an atmosphere of flag worshipping and patriotic obedience and allegiance are the same oppressors who have a whole reactionary "resurgent America" agenda. An agenda that calls for a resurgence of racists attacks on Black people, outlawing women's right to abortion as part of putting them back in "their place" and building concentration camps for immigrants fleeing American backed starvation and death in Central American and Mexico. It is a sign of the utter desperation and uncertainty of the future that is guiding all of these attacks.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

/s/ Gregory Lee Johnson
GREGORY LEE JOHNSON

Dated: 12-1-89

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. CR89-315-R

UNITED STATES OF AMERICA, PLAINTIFF

v.

MARK JOHN HAGGERTY, ET AL., DEFENDANTS

[Filed: Jan. 18, 1990]

MOTION TO DISMISS—ORAL ARGUMENT REQUESTED

Defendants, Mark John Haggerty, a/k/a Aden Xould, Carlos Garza, Darius Allen Strong, and Jennifer Campbell, hereby jointly move, pursuant to Fed.R. Crim.P. Rule 12(b), to dismiss the information filed against them. The grounds for defendants' motion are set forth in the accompanying memorandum of law.

Dated this 18th day of January, 1990.

Respectfully submitted:

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/s/ Williams Kunstler
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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. CR89-315-R

UNITED STATES OF AMERICA, PLAINTIFF

v.

MARK JOHN HAGGERTY, ET AL., DEFENDANTS

[Filed: Jan. 18, 1990]

DECLARATION OF MARK HAGGERTY

MARK HAGGERTY, hereby declares, under penalty of perjury, as follows:

1. My name is Mark Haggerty and I am also known as Aden Xould.

2. I gave the following speech at a press conference in front of the United States courthouse in Seattle, on December 1, 1989. The speech states my reasons for burning a flag of the United States.

3. The speech I gave is as follows. My name is Aden, and I am a supporter of the Revolutionary Action Group. I participated in the mass defiance of the unconstitutional and undemocratic flag burning law in order to demonstrate that it is not the constitution and the legal system that defends democratic rights but the struggle of the masses against the legal system of the capitalist state that defends democratic rights.

For example, in the struggle to defend abortion rights it is not the legal system that should be relied on to defend

abortion rights. In fact the Supreme court is in the forefront of undermining these rights. It is the workers and poor that must be mobilized to fight against the ruling class courts and police to defend abortion rights.

The U.S. flag stands not for the people of the U.S. but for the power of the super-rich ruling class as expressed through their government. It does not stand for the workers and poor whose class interests are opposite to that of the rich. For example, the Boeing workers' strike pitted the workers' interest for higher wages and no forced overtime against the company's interests for maximum profits and exhausting overwork. The American flag and the alleged "freedom" it stands for, is, in fact, the freedom of the rich to exploit the workers for maximum profits.

This is the freedom of the "free world." No less hypocritical is the so-called "socialism" of the Soviet Union and East European countries. This so-called socialism stands for the exploitation of the workers there by the government. The workers' interests in the U.S. lie in overthrowing the government of the rich and building socialism. Not the phony socialism of the East Bloc bureaucracies, but real socialism constructed on the power of the working people.

I declare under penalty of perjury that the foregoing is true to the best of my knowledge, information and belief.

/s/ Mark Haggerty
MARK HAGGERTY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. CR89-315-R

UNITED STATES OF AMERICA, PLAINTIFF

v.

MARK JOHN HAGGERTY, ET AL., DEFENDANTS

[Filed: Jan. 18, 1990]

AFFIDAVIT OF JENNIFER PROCTOR CAMPBELL

The undersigned, being first duly sworn on oath,
deposes and states:

1. I am a college student at the University of Washington and a defendant in this action.
2. On October 28, 1989, I burned a flag of the United States of America in Seattle, Washington at a demonstration held in response to the leaflet attached to this Affidavit as Exhibit A.
3. My reason for burning the flag of the United States of America was highly political, intentional and designed to make the people of this country wake up and take

notice of what is going on around them. It seems to me that the American public has become too preoccupied with symbols, and, rather than questioning what the flag stands for, instead chooses to march in lockstep behind it, never questioning where we are going, or the effect our national policies have on the homeless, the poor, and those disenfranchised minorities and women, who to this day continue to be the victims of racial and sexual discrimination.

Burning the flag for me is one way to strip off this blindfold of unquestioning allegiance and to cause people to focus on the suffering of people, both at home and abroad, and to thereby move American closer towards everything it is supposed to be.

3. Whenever I look at the flag, I cannot help but picture the spilled blood of American Natives, the enslavement of African-Americans, the internment of Asian-Americans, and the breaking of the treaty of Guadalupe-Hidalgo which previously entitled Chicano-Americans to retain their land and culture.

Rather than demanding admiration and respect, the flag, in my view, cannot be separated from its history, and therefore deserves to be burned.

4. I burned the flag knowing full well that there are those who believe that my patriotism and respect for the flag is something that can be coerced through the passage of a law making it a crime to burn or deface the flag. I do not agree with these people and believe that my view towards the flag is inseparable from my view of America,

and that to prohibit me from burning or defacing the flag is the equivalent of legislation how I should feel about this country's sordid history.

/s/ Jennifer Proctor Campbell
JENNIFER PROCTOR CAMPBELL

Dated: 17/1/90

Subscribed and sworn to before me this 17th day of January, 1990.

/s/ Susan R. Kern
Notary Public in and for
the State of Washington,
residing at Port Orchard.

Warning! This flyer will be illegal as of Oct. 28th

FESTIVAL OF DEFIANCE

*"Burning a flag
is more of a
symbol of
freedom than
the flag itself"*

—Stinky Patch
Maximum Rock and Roll

• PRESS CONFERENCE : FRIDAY OCT 27 AT NOON

■ FRONT OF THE POST OFFICE BROADWAY & DENNY

On October 28th it becomes illegal to desecrate the flag. This fascist law is not an "exception" to the concept of free speech but an attack on political protest and dissent, and a precedent for the future. Blind patriotism must not be the law of the land. Unlike the flag-kissers, we will not whine, we will Rock & Roll in a Festival of Defiance.

At one minute after midnight, Friday night/Saturday morning, the Festival begins. You know what to bring. You know what to do. In front of the post office at Broadway & Denny.

ANTI-PATRIOTISM IS A DUTY NOT A CRIME
DOWN WITH FASCIST FLAG AMENDMENTS AND LAWS!

• FESTIVAL OF DEFIANCE: FRIDAY NIGHT AT MIDNIGHT

■ FRONT OF THE POST OFFICE BROADWAY & DENNY



UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. CR89-315-R

UNITED STATES OF AMERICA, PLAINTIFF

v.

MARK JOHN HAGGERTY, ET AL., DEFENDANTS

[Filed: Jan. 18, 1990]

DECLARATION OF DARIUS STRONG

I, DARIUS STRONG, do hereby certify and declare that the following is true and accurate:

1. I am over the age of 18 years and I am competent to testify to the matters set forth below.

2. I am being prosecuted by the Government in the above-captioned matter, a matter which alleges that on October 28, 1989 I committed the crime of violation of Title 18, United States Code, §§ 1361 and 1362 by willfully injuring or committing a depredation against United States property, specifically, a flag of the United States, as well as commission of a crime constituting a violation of Title 18, United States Code §§ 700(a)(1) and (2), a claim that I knowingly burned a flag of the United States.

3. On October 28, 1989, I was involved in a rally and demonstration in front of the United States Post Office located at Broadway and Denny in Seattle. At the rally a number of what looked like American flags were burned. It is claimed that a United States flag belonging to the Post

Office was burned. My involvement in that demonstration was for political purposes. It has been my belief that the flag of the United States is a symbol of certain values commonly held by United States citizens; those values have produced the nation which the flag represents. Among those values is a tolerance of expression of opinion, no matter how extreme or objectionable the expressed opinion may be.

4. My involvement at the demonstration and rally, which is the subject of this prosecution, was consistent with my belief that the burning of a United States flag is an expression of my disagreement with the Government's policy that you cannot burn a flag because a flag is somehow sacred. My involvement also constituted an expression by me that destruction of the flag is an exercise of my right to be free to express objectionable ideas, a right guaranteed to me and to all citizens of the United States by the Constitution of the United States of America. It was my belief in doing what I did that I was communicating the idea that a person's freedom to express an opinion critical of the government is of greater legal and moral value in America than the Government's authority to criminalize acts constituting demonstrations of or expressions of individual beliefs. I believe that flag burning can be quite as fundamentally patriotic as flag waving.

I, Darius Strong, do declare under penalty of perjury under the laws of the United States of America that the matters set forth above are true and accurate.

EXECUTED this 12 day of JANUARY, 1989 at Seattle, Washington.

/s/ Darius Strong

DARIUS STRONG

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. CR89-315-R

UNITED STATES OF AMERICA, PLAINTIFF

v.

MARK JOHN HAGGERTY, ET AL., DEFENDANTS

[Filed: Jan. 18, 1990]

AFFIDAVIT OF CARLOS GARZA

Carlos Garza being first duly sworn on oath, swears and affirms the following:

1. I burned an American flag on October 28, 1989. That act resulted in my being a defendant in the above-entitled matter.
2. I am a 32 year old, Mexican-American who was born in Billings, Montana. I moved to the Los Angeles, California area at the age of 4 years old.
3. My formal education consists of having completed the eighth grade in the Los Angeles public school system.
4. I believe 40 to 60 percent of those with whom I attended grammar school are now either dead or in prison. My own brother was killed as a result of gang violence.
5. I spent most of my working hours on jobs in factories or as a gardener. It is almost impossible for Hispanics in America to earn a livable wage.

6. Hispanics in America are very mistreated. Hispanics in America are essentially struggling to survive on a daily basis.

7. American is a beautiful and rich country. There should not be any homeless people on the streets of America.

8. I blame the United States government for the problems of homelessness, hunger and unemployment in our country. I blame the United States government for the fact that 40 to 60 percent of those people I went to grammar school with are either dead or in prison.

9. I burned an American flag to speak out on the problems caused by our government in America. The American flag symbolizes the problems of our country. The American flag was with the United States troops that took the land that belonged to native Americans. While the American flag symbolizes good, it also symbolizes the misdeeds in which our government has participated.

10. The American flag represents the system and the government for which it stands. I love and respect America. I love and respect the America people. I do not love and respect the way Hispanic Americans are treated by the United States government.

11. I burned an American flag to express my outrage over the mistreatment of Hispanic Americans by our government.

12. America is a great country. In America we have the right to freedom of speech and freedom of expression. The day these rights are taken away from us, will be a dark day in American history. When the right to burn a symbol is taken away from American citizens, democracy itself is on the brink of collapse.

13. In an effort to protect and preserve freedom of speech and freedom of expression, I respectfully request

this court to declare the "The Flag Protection Act of 1989" a violation of the First Amendment to Our United States Constitution.

I declare under penalty of perjury that the foregoing is true and correct.

DATED this 11 day of January, 1990.

/s/ Carlos Garza
CARLOS GARZA

SIGNED AND SWORN to before me this 11th day of January, 1990 by Carlos Garza.

s/ [illegible]
NOTARY PUBLIC in and for the
State of Washington. My
Commission expires: 10/10/91

Supreme Court of the United States

No. 89-1433

UNITED STATES OF AMERICA, APPELLANT

v.

SHAWN D. EICHMAN, ET AL.

No. 89-1434

UNITED STATES OF AMERICA, APPELLANT

v.

MARK JOHN HAGGERTY, ET AL.

The motion of the Solicitor General to expedite consideration of the statements as to jurisdiction is granted. In these cases probable jurisdiction is noted. The cases are consolidated and a total of one hour is allotted for oral argument.

The brief of the Solicitor General is to be filed with the Clerk of the Court and served upon appellees on or before 3:00 p.m., Wednesday, April 18, 1990. The brief(s) of the appellees is to be filed with the Clerk of the Court and served upon the Solicitor General on or before 3:00 p.m., Thursday, May 3, 1990. Any reply brief is to be filed with the Clerk of the Court and served upon appellees on or before 3:00 p.m., Thursday, May 10, 1990. The cases are set for oral argument at 10:00 a.m., Monday, May 14, 1990.

March 30, 1990

MAR 30 1990

JOSEPH F. SARNIOL, JR.
CLERK**In the Supreme Court of the United States**

OCTOBER TERM, 1989

No. 89-1433 (3)

UNITED STATES OF AMERICA, APPELLANT

v.

SHAWN E. EICHMAN, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

No. 89-1434 (2)

UNITED STATES OF AMERICA, APPELLANT

v.

MARK JOHN HAGGERTY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WASHINGTON

**BRIEF FOR THE SPEAKER AND LEADERSHIP GROUP OF THE U.S.
HOUSE OF REPRESENTATIVES IN SUPPORT OF JURISDICTIONAL
STATEMENTS**

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MARCH 1990

QUESTION PRESENTED

Whether an Act of Congress protecting in a content-neutral fashion the physical integrity of the flag is constitutional as applied to the hauling down and burning, accompanied by violence, of a flag denominating a United States facility.

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In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1433

UNITED STATES OF AMERICA, APPELLANT

v.

SHAWN E. EICHMAN, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

No. 89-1434

UNITED STATES OF AMERICA, APPELLANT

v.

MARK JOHN HAGGERTY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTONBRIEF FOR THE SPEAKER AND LEADERSHIP GROUP OF THE U.S.
HOUSE OR REPRESENTATIVES IN SUPPORT OF JURISDICTION-
AL STATEMENTS**INTEREST OF THE AMICI CURIAE**The Speaker and Leadership Group of the United
States House of Representatives ("House amici") respec-

(1)

tively submit this brief as *amici curiae*, to provide an official defense of a challenged Act of Congress, the Flag Protection Act of 1989.¹ In response to *Texas v. Johnson*, 109 S. Ct. 2533 (1989), President Bush called for a constitutional amendment for flag protection. The Department of Justice testified it believed that *only* a constitutional amendment could protect the flag. While the Executive Branch's position appears to be somewhat modified before this Court, it is not the only official defense of the statute warranted in a case challenging the constitutionality of an Act of Congress.

For such cases, the Senate and House may provide an official defense. The Court has noted that "[w]e have long held that Congress is the proper party to defend the validity of a statute when [the Executive Branch argues] that the statute is inapplicable or unconstitutional." *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 923 (1983). The Speaker and Leadership Group of the House of Representatives have often done so. See, e.g., *American Foreign Service Assn. v. Garfinkel*, 109 S. Ct. 1693 (1989); *United States Army Corps of Engineers v. Ameron, Inc.*, 109 S. Ct. 297 (1988); *Morrison v. Olson*, 108 S. Ct. 2597 (1988); *United States v. Helstoski*, 442 U.S. 447 (1979). House *amici* presented a full defense of this Act in briefing and argument in the district court.

STATEMENT

Last year, this Court struck down Texas' provision prohibiting "seriously offensive" desecration of venerated objects (including flags) in *Texas v. Johnson* as a non-neutral imposition on expressive conduct. The decision elicited a powerful reaction, fueled by President Bush's and

¹ For the purposes of this brief, the Leadership Group joining the Speaker consists of Majority Leader Richard A. Gephardt and Majority Whip William Gray III. Republican Leader Robert Michel and Republican Whip Newt Gingrich declined to join in this brief.

Counsel for the Defendants and the Solicitor General have consented to the filing of this brief. Their letters of consent are being lodged with the Clerk of the Court.

Attorney General Thornburgh's urging of a constitutional amendment.² The Administration's calls to alter, for the first time, the Bill of Rights presented Congress with the choice between enacting such a constitutional amendment to override the Court's decision in the *Texas v. Johnson* or amending the existing federal flag protection statute to bring it into compliance with that decision. Congress chose to comply. It conducted extensive hearings and received scholarly testimony regarding this Court's language in *Texas v. Johnson* which distinguished the government's legitimate interest in neutrally protecting the "physical integrity of the flag" from the illegitimate interests evidenced by non-neutral statutes, such as the Texas "serious offense" statute. Congress concluded that a statute could be drafted to comply with this Court's decision and therefore adopted the Flag Protection Act of 1989 ("Federal Flag Act" or "the Act"), Pub. L. No. 101-131, 103 Stat. 777 (amending 18 U.S.C. §700). The proposed constitutional amendment was deferred.

The new act went into effect on October 27, 1989. That day, a flier was circulated in Seattle announcing plans to conduct a rally called a "Festival of Defiance." At the appointed hour, a largely youthful mob assembled at the United States Post Office at 101 Broadway Street East, over which flew a flag owned by the United States government. Ensuing events were filmed, with a videotape that was part of the record below.³ The leader of the

² "The President and I have endorsed the amendment proposed by Senators Dole and Dixon and Congressmen Michel and Montgomery." Letter from Attorney General Richard Thornburgh to Senator Strom Thurmond, July 31, 1989, reprinted in *Hearings on Measures to Protect the Physical Integrity of the American Flag: Hearings Before the Sen. Comm. on the Judiciary*, 101st Cong., 1st Sess. 119 (1989).

³ This appeal is taken from the district court's decision granting defendants' motion to dismiss Count II of the Information. The United States Attorney attached to the Information an affidavit explaining that postal inspectors and agents of the Federal Bureau of Investigation had been assigned to the announced disorders. Affidavit by Steven

action, defendant Mark Haggerty, lowered the Post Office's flag, and burned it, assisted by the defendants Carlos Garza, Jennifer Campbell, and Darius Strong.

As the eyewitness accounts and videotape show, see note 3, *supra*, the flagburning precipitated violent disorders:

A group of individuals with shaved heads and green jackets with U.S. flags on the arm was taunted by the white male in black (on top of the Post Office roof). Pushing and shoving began amongst the crowd and some punches were thrown by unidentified individuals.

Another unidentified individual brought a McDonald's flag to the front of the Post Office, which was also burned on the side of the wall of the Post Office building. . . .

. . . Traffic was at a standstill, people were honking their car horns and yelling at the flag burners.

An unidentified individual threw what appeared to be "tear-gas" into the crowd by the burning flag. Someone in the crowd stated that this was to prevent putting the burning flag out. The crowd ran from the burning flag and smoke.

Memorandum of Special Agent Steven M. Dean (November 2, 1989), *United States v. Haggerty*, No. CR89-315-R (W.D. Wash.), at 2. The videotape and accounts describe the injuries by those caught in the violence. See note 3, *supra*.

The United States filed an Information charging the defendants with two counts, both of which emphasized that the postal service flag was the property of the

M. Dean and Stan Pilkey (November 28, 1989), attached to the Information. The affidavit notes that "Postal Inspector John Buck was also present throughout the protest operating a video camera to record the event. Postal Inspector Buck produced a videotape which depicts portions of the protest." *Id.*, at para. 5. The agents supplemented their own videotape with film from television stations which covered the events. "A composite tape which consists of both the postal inspectors tape and the commercial news broadcasts is attached as Exhibit A." *Id.*, at para. 6.

United States. Count I charged that the defendants "did willfully injure or commit a depredation against property of the United States and an agency thereof, to wit, a flag of the United States, which was the property of the United States Postal Service," in violation of 18 U.S.C. §§ 1361-62. Count II charged that they "did knowingly burn a flag of the United States, to wit, the flag of the United States, which was the property of the United States Postal Service," in violation of 18 U.S.C. § 700(a)(1) and (2).

Defendants moved to dismiss Count II; without disputing the facts set forth by the prosecution, they asserted that the Flag Protection Act was unconstitutional as applied to those facts. They filed various post-hoc affidavits asserting linkages between their acts and political causes, none of which expressly justified, or even noted, defendants' own decision to burn a flag which was the property of the United States government.

The Justice Department, which has traditionally supported the constitutionality of flag protection statutes, has taken positions supporting the need expressed by President Bush and Attorney General Thornburgh for a constitutional amendment. It thereby failed to present Congress' position, set out at length in both the House and Senate committee reports on the bill, that the bill sought to comply with, rather to necessitate and overruling of, *Texas v. Johnson*. Accordingly, to provide the official defense of the statute comporting with the Congressional intent to comply, the Senate and House *amici* appeared in the case, by filing briefs defending the Act and presenting oral argument.

After hearing argument from the parties and the Senate and House *amici*, the district court struck down the Flag Protection Act as applied. In their briefs, the Senate and House *amici* had set forth how the particular language of the Flag Protection Act of 1989 derived from the sharply drawn contrast in *Texas v. Johnson* between a non-neutral statute (namely, the unconstitutional Texas

provision aimed at "seriously offensive" expression), and a neutral provision (namely, one "aimed at protecting the physical integrity of the flag in all circumstances"). 109 S. Ct. at 2543. House *amici* had shown how protection of the "physical integrity of the flag" accorded with the original intent of the Framers of the First Amendment, particularly James Madison, who considered protection of the flag as an incident of sovereignty, not a suppression of expression. This issue had not been decided in *Texas v. Johnson*, since the Texas provision turned on the non-neutral test of "serious offense" and since that provision was supported only by related interests in suppression of expression raised by Texas.

Faced with an Act of Congress premised upon this Court's pronouncements concerning the constitutionality of a statute neutrally "aimed at protecting the physical integrity of the flag," the district court, although fully apprised of the basis for enactment, refused even to decide the validity of that basis. It only spoke of that matter in a footnote, saying it would not reach the validity of that basis for enactment because "the Act fails to protect the flag's physical integrity"; the Act failed to fulfill its purpose of complying with this Court's language, the district court held, because "flying the flag in inclement weather or carrying it into battle, are not prohibited [by the Act]." Slip op. at 12 n.6 (emphasis supplied). Congress's decision to comply with *Texas v. Johnson* thus never even received judicial recognition because this Court's language was read as equating neutrality with forbidding the armed forces to carry the flag into battle—a suggestion without support in this Court's opinions, in the legislative history, or anywhere else.⁴ The district court also took no step

⁴ The suggestion that the government's admitted inability to protect, by statute or otherwise, the physical integrity of the flag against the ravages of either nature or war hardly can diminish the government's authority to protect the flag from the dangers that are within the province of governmental control. The statute does not condone the damage done to a flag in a storm by the forces of nature or, in a

Continued

toward considering the significance that the defendants destroyed a flag owned by the United States which denominated one of its facilities, and that they had thereby precipitated violence. From the district court judgment of dismissal, the United States noted its appeal.⁵

THE QUESTION IS SUBSTANTIAL

Texas v. Johnson established that, in some circumstances, flagburning can be one of the forms of conduct considered expressive. The Texas provision in that case was singularly ill-suited for dealing with expressive conduct, since it singled out "offensive" expression. However, *Texas v. Johnson* does not prohibit every statute dealing with flagburning in every way. When Congress had to decide whether to grant President Bush's call for an immediate constitutional amendment to overrule *Texas v. Johnson*, it properly identified this Court's distinction between neutral and non-neutral flag protection statutes, and the difference in the interests behind them. Nothing in *Texas v. Johnson* requires, as the district court's judgment would, that every statute which protects the flag be struck down as non-neutral unless "carrying [the flag] into battle, [is] prohibited," slip op. at 12 n.6.

Moreover, the district court judgment here is in conflict with a recent decision of the United States Court of Appeals for the eighth Circuit upholding, after *Texas v. Johnson*, a federal flagburning prosecution on comparable facts. In *United States v. William Charles Cary, Jr.*, No. 88-5458 (8th Cir. filed Feb. 26, 1990), the defendant Cary burned a United States flag at an Armed Services Recruitment Center in Minneapolis, during another violent

battle, by a foreign enemy. It merely recognizes that neither weather nor the gunfire of an enemy at war with the United States are susceptible to statutory control.

⁵ The facts and ruling in the District of Columbia case, *United States v. Eichman*, are set forth in the Justice Department's Jurisdictional Statement in that case. That district court largely followed the opinion of the Seattle district court, which may appropriately be considered the principal case.

confrontation. A district court convicted Cary for violating the federal flag protection act,⁶ and the Eighth Circuit affirmed the conviction. It correctly explained that *Texas v. Johnson* did not invalidate all flag protection statutes, only those aimed at suppressing particular messages like the Texas provision. A statute with a different governmental interest still validly applies:

Cary intended to convey his disagreement with the United States Government's decision to send 3,200 troops to Honduras. His means of communicating that message was the burning of the American flag. The government's interest in punishing Cary's violation of § 700 was to prevent further breaches of the peace which would likely result from the reaction of the vandals to Cary's means of communicating his message in the context of violence, not to the message itself. Cary's punishment is akin to a time, place and manner restriction, and not to a content-based restriction.

Slip op. at 12.

Congress legitimately had important governmental interests in mind, unrelated to suppression of particular messages, in following this Court's language regarding neutrally protecting the physical integrity of the flag. In the matter of flag destruction, an issue familiar to the Framers—flags being as combustible in the 1600s and the 1700s as now—the original intent of the Framers provides a valid means for determining whether the First Amendment as originally written allows for neutral flag protection, without any need for further amendment. See Scalia, *Originalism: The Lesser Evil*, 57 Cinn. L. Rev. 849, 864–65 (1989) (willingness to consult original intent is “a rather fundamental—indeed, the most fundamental—aspect of constitutional theory and practice”). The Framers considered the flag they adopted and sought to pro-

⁶The United States prosecuted Cary pursuant to 18 U.S.C. 700 in its form prior to amendment by the Flag Protection Act of 1989. The statutory amendment does not diminish the validity of the Eighth Circuit's reasoning as applied to the prosecutions of either Cary or Hagerty.

tect, apart from being merely a patriotic or any other type of symbol, as an incident of sovereignty. Sovereignty was, and remains, a primary concern of the government. “The word ‘nation’ as ordinarily used presupposes or implies an independence of any other sovereign power more or less absolute, an organized government, recognized officials, a system of laws, definite boundaries and the power to enter into negotiations with other nations.” *Montoya v. United States*, 180 U.S. 261, 265 (1901). Absent sovereignty and its incidents, government is “nothing more than a temporary submission to an intellectual or physical superior[.]” *Id.*

The formal adoption of the flag in 1775 showed more than an interest in a patriotic symbol; it shows a sovereignty interest, since, as historians note, the nascent American navy required a flag to avoid treatment of its seamen as pirates.⁷ In so acting, the Framers drew on an established history, for as this Court recently noted, flag requirements had been taken throughout the colonial period as legal indicia of sovereignty, *United States v. Maine*, 475 U.S. 89, 97 n.11 (1986) (recounting history of the 1600s and 1700s), apart from patriotic symbolism. On four different occasions, James Madison, draftsman of the First Amendment, recognized and sustained the legitimacy of the sovereignty interest in protecting the flag.⁸ As Judge Bork recited regarding an 1802 incident, with a pronouncement by Madison:

Thus, the tearing down in Philadelphia in 1802 of the flag of the Spanish minister, “with the most aggravating insults,” was considered actionable in the Pennsylvania courts as a violation of the law of nations. 4 J. Moore, *Digest of International Law* 627 (1906) (quoting letter from Secretary of State Madison to Governor McKean (May 11, 1802)).

⁷ B.W. Tuchman, *The First Salute* 47 (2988); *Texas v. Johnson*, 109 S. Ct. at 2549 (Rehnquist, J., dissenting).

⁸ The lengthy source material on this point are appended to the brief of the House Amici Curiae in the district court.

Finzer v. Barry, 798 F.2d 1450, 1456 (D.C. Cir. 1986), *aff'd in part and rev'd in part on other grounds*, *Boos v. Barry*, 485 U.S. 312 (1988).

Texas v. Johnson, in surveying prior flag precedents, confirmed as good law *Halter v. Nebraska*, 205 U.S. 34 (1907), which upheld a prosecution for misuse of the flag. 109 S. Ct. at 2545 n.10 (distinguishing *Halter* as "not to the contrary" of *Texas v. Johnson*). *Halter v. Nebraska* explicitly recognizes the legitimacy of the sovereignty interest, noting approvingly the flag's role as an instrument of "national sovereignty," how the flag related to "the existence and sovereignty of the Nation," and how it "has often occurred that insults to a flag have been the cause of war, and indignities put upon it . . . [are] sometimes punished on the spot." 205 U.S. at 41. House amici's fuller recitation of the Framers' original intent regarding the sovereignty interest should await briefing on the merits; at this time, it suffices that even the district court acknowledged that "the House recounts the history of the use of the United States flag as an indicator of sovereignty, including numerous instances in which violations of the flag's physical integrity have been deemed threats to the sovereignty of this nation." Slip op. at 12.

As the Eighth Circuit soundly noted in recently upholding Cary's flagburning conviction, a "conviction [can be] based upon a federal statute which, unlike its Texas counterpart, does not require as an element of the crime that his expressive conduct offend third parties. Furthermore, there is no evidence in the record that anyone on the scene was even offended by Cary's actions or his message." *Cary*, slip op. at 12. *Texas v. Johnson* premised the striking down of Texas's provisions on Texas's fatally flawed quest to create "a determinate range of meanings [for the flag], Brief for Petitioner [Texas] 20-24," 109 S. Ct. at 2544. Congress had no such quest. The Flag Protection Act of 1989 includes no test of whether defendants "seriously offend" others, contemplates no evidence as to what defendants meant or whether they offended some audience, and in no other way incorporates any ideological tests.

As the Eighth Circuit properly concluded, "the government's interest . . . on these facts is not related to suppressing debate or disputes between opponents nor does it offend the First Amendment's high purpose" *Id.* Nothing in *Texas v. Johnson* supports the opposite conclusion of the *Haggerty* district court, necessitating a constitutional amendment for any flag protection, that "even if Congress does seek to prevent harm to the flag as an incident of sovereignty," nevertheless, "that interest relates to the suppression of expression." Slip op. at 13.

CONCLUSION

The Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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MARCH 1990

(5) (4)
Nos. 89-1433 and 89-1434

Supreme Court, U.S.

FILED

APR 17 1990

JOSEPH F. SPANIOLO, JR.

In the Supreme Court of the United States

OCTOBER TERM, 1989

UNITED STATES OF AMERICA, APPELLANT

v.

SHAWN D. EICHMAN, ET AL.

UNITED STATES OF AMERICA, APPELLANT

v.

MARK JOHN HAGGERTY, ET AL.

ON APPEALS FROM THE UNITED STATES
DISTRICT COURTS FOR THE DISTRICT OF COLUMBIA
AND THE WESTERN DISTRICT OF WASHINGTON

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the First Amendment prohibits the United States from prosecuting appellees for knowingly burning a flag of the United States, in violation of 18 U.S.C. 700(a), as amended by the Flag Protection Act of 1989, Pub. L. No. 101-131, § 2(a), 103 Stat. 777.

II

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption in *United States v. Eichman*, No. 89-1433, David Gerald Blalock and Scott W. Tyler were defendants in the district court and are appellees here.

In addition to the parties named in the caption in *United States v. Haggerty*, No. 89-1434, Carlos Garza, Jennifer Proctor Campbell, and Darius Allen Strong were defendants in the district court and are appellees here.

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the district court in *Eichman* (89-1433 J.S. App. 1a-18a) is not yet reported. The opinion of the district court in *Haggerty* (89-1434 J.S. App. 1a-16a) is not yet reported.

(1)

JURISDICTION

The judgment of the district court in *Eichman* was entered on March 5, 1990. A notice of appeal was filed on March 6, 1990 (89-1433 J.S. App. 20a-21a), and the jurisdictional statement was filed on March 13, 1990. The judgment of the district court in *Haggerty* was entered on February 21, 1990. A notice of appeal was filed on February 23, 1990 (89-1434 J.S. App. 17a-18a), and the jurisdictional statement was filed on March 13, 1990. In each case, the jurisdiction of this Court is invoked under Section 3 of the Flag Protection Act of 1989, Pub. L. No. 101-131, 103 Stat. 777 (to be codified at 18 U.S.C. 700(d)). The Court noted probable jurisdiction over the appeals and consolidated them on March 30, 1990. J.A. 85.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides, in relevant part: "Congress shall make no law * * * abridging the freedom of speech * * *."

Section 700 of Title 18, United States Code, as amended effective October 28, 1989, by the Flag Protection Act of 1989, Pub. L. No. 101-131, §§ 1-3, 103 Stat. 777, provides:

(a) (1) Whoever knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon any flag of the United States shall be fined under this title or imprisoned for not more than one year, or both.

(2) This subsection does not prohibit any conduct consisting of the disposal of a flag when it has become worn or soiled.

(b) As used in this section, the term "flag of the United States" means any flag of the United States, or any part thereof, made of any substance, of any size, in a form that is commonly displayed.

(c) Nothing in this section shall be construed as indicating an intent on the part of Congress to deprive any State, territory, possession, or the Commonwealth of Puerto Rico of jurisdiction over any offense over which it would have jurisdiction in the absence of this section.

(d) (1) An appeal may be taken directly to the Supreme Court of the United States from any interlocutory or final judgment, decree, or order issued by a United States district court ruling upon the constitutionality of subsection (a).

(2) The Supreme Court shall, if it has not previously ruled on the question, accept jurisdiction over the appeal and advance on the docket and expedite to the greatest extent possible.

STATEMENT

In *Texas v. Johnson*, 109 S. Ct. 2533 (1989), this Court held that a state statute outlawing desecration of venerated objects, as applied to the burning of an American flag, violated the First Amendment. That decision raised concerns in the Executive and Legislative Branches over the vitality of an analogous federal provision, 18 U.S.C. 700(a) (1988).¹ In response, Congress amended that statute with the Flag Protection Act of 1989, Pub. L. No. 101-131, §§ 1-3,

¹ Former Section 700 (a) made criminally liable:

Whoever knowingly casts contempt upon any flag of the United States by publicly mutilating, defacing, defiling, burning, or trampling upon it * * *.

103 Stat. 777. As amended, Section 700(a)(1) eliminates the prior statutory language of "knowingly cast[ing] contempt upon any flag of the United States" and makes criminally liable those persons who, without regard to the content of their expression, physically damage or mistreat a flag of the United States. See pp. 2-3, *supra*.

Shortly after the Flag Protection Act became effective, appellees participated in unrelated demonstrations in Seattle, Washington, and Washington, D.C., and burned several American flags. Appellees were charged in separate criminal informations filed in the District of Columbia and the Western District of Washington with knowingly burning a flag of the United States, in violation of 18 U.S.C. 700(a), as amended by the Flag Protection Act of 1989, Pub. L. No. 101-131, § 2(a), 103 Stat. 777.² Relying expressly on *Texas v. Johnson*, the district courts dismissed the flag-burning charges, holding that the Flag Protection Act of 1989, as applied to appellees' conduct, violated the First Amendment.

A. *Texas v. Johnson*

The defendant in *Texas v. Johnson* burned an American flag during a political demonstration in Dallas. He was convicted in Texas state court of desecrating a venerated object, in violation of Tex. Penal Code § 42.09(a)(3) (1974). Under that provision, an individual "commit[ted] an offense if he intentionally or knowingly desecrates * * * a state or national flag," *ibid.*; the statute defined "desecrate" to "mean[] deface, damage, or otherwise

² Appellees in *Haggerty* were also charged with one count of willfully injuring property of the United States, in violation of 18 U.S.C. 1361 and 2. J.A. 34; see pp. 16-17, *infra*.

physically mistreat in any way that the actor knows will seriously offend one or more persons likely to observe or discover his action," *id.* § 42.09(b). Johnson contended before the Texas state appellate courts that the First Amendment prohibited his criminal conviction for flag burning. The Texas Court of Criminal Appeals agreed. See *Texas v. Johnson*, 109 S. Ct. at 2536-2537.

On June 21, 1989, this Court affirmed that ruling by a sharply divided vote, holding that the Texas statute outlawing desecration of venerated objects, as applied to the burning of an American flag, violated the First Amendment. *Texas v. Johnson*, 109 S. Ct. at 2536-2548 (Brennan, J., joined by Marshall, Blackmun, Scalia, and Kennedy, JJ.); *id.* at 2548 (Kennedy, J., concurring); *id.* at 2548-2555 (Rehnquist, C.J., joined by White and O'Connor, JJ., dissenting); *id.* at 2555-2557 (Stevens, J., dissenting).

At the outset, the Court outlined the pertinent analysis:

We must first determine whether Johnson's burning of the flag constituted expressive conduct, permitting him to invoke the First Amendment in challenging his conviction. If his conduct was expressive, we next decide whether the State's regulation is related to the suppression of free expression. If the State's regulation is not related to expression, then the less stringent standard we announced in *United States v. O'Brien*, [391 U.S. 367, 377 (1968)], for regulations of noncommunicative conduct controls. If it is, then we are outside of *O'Brien's* test, and we must ask whether this interest justifies Johnson's conviction under a more demanding standard.

109 S. Ct. at 2538 (citations omitted). The Court found that "Johnson's burning of the flag was conduct sufficiently imbued with elements of communication to implicate the First Amendment," *id.* at 2540 (internal quotation marks and citation omitted); the Court thus turned to consider the interests advanced by the State of Texas to support its prohibition against flag burning.

The State first asserted an interest in preventing breaches of the peace. The Court found, however, that "[t]he only evidence offered by the State at trial to show the reaction to Johnson's actions was the testimony of several persons who had been seriously offended by the flag-burning," 109 S. Ct. at 2541, and thus concluded that the "State's position * * * amounts to a claim that an audience that takes serious offense at particular expression is necessarily likely to disturb the peace," *ibid.* The Court rejected that sort of categorical presumption and held that, on the record presented, "the State's interest in maintaining order is not implicated." *Id.* at 2542.

Turning to the State's other asserted interest, "preserving the flag as a symbol of nationhood and national unity," 109 S. Ct. at 2542, the Court first concluded that that interest "is related to expression in the case of Johnson's burning of the flag," *ibid.* (citing *Spence v. Washington*, 418 U.S. 405 (1974)). The Court noted that the State appeared to be concerned "that such conduct will lead people to believe either that the flag does not stand for nationhood and national unity, but instead reflects other, less positive concepts." 109 S. Ct. at 2542. Since those "concerns blossom only when a person's treatment of the flag communicates some message," the Court determined that the State's interest was related "to the suppression of free expression." *Ibid.* And the Court

specifically found that Johnson "was prosecuted for his expression of dissatisfaction with the policies of this country, expression situated at the core of our First Amendment values." *Id.* at 2543. Consequently, the less stringent standard of *O'Brien* was inapplicable. Instead, the Court subjected the State's "asserted interest in preserving the special symbolic character of the flag to 'the most exacting scrutiny.'" *Ibid.* (quoting *Boos v. Barry*, 485 U.S. 312, 321 (1988)).³

The Court concluded that that interest could not overcome "a bedrock principle underlying the First Amendment," namely, "that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." 109 S. Ct. at 2544. The Court rejected the proposition that "a State may foster its own view of the flag by prohibiting expressive conduct related to it," *id.* at 2545, stating that it has "never before * * * held that the Government may ensure that a symbol be used to express only one view of that symbol or its referents," *id.* at 2546. And the Court refused to accord the flag any special constitutional protection, finding that there is "no indication—either in the text of the Constitution or in our cases interpreting it—that a separate juridical category exists for the American flag alone." *Ibid.*

Chief Justice Rehnquist, joined by Justices White and O'Connor, dissented. 109 S. Ct. at 2548-2555.

³ The Court noted that the record contained no suggestion that the defendant had stolen the flag he burned. As a result, the Court made clear that "nothing in [its] opinion should be taken to suggest that one is free to steal a flag so long as one later uses it to communicate an idea." *Texas v. Johnson*, 109 S. Ct. at 2544 n.8.

He stated: "For more than 200 years, the American flag has occupied a unique position as the symbol of our Nation, a uniqueness that justifies a governmental prohibition against flag burning in the way * * * Johnson did here." *Id.* at 2548. The Chief Justice pointed out that the "flag is not simply another 'idea' or 'point of view' competing for recognition in the marketplace of ideas." *Id.* at 2552. Accordingly, he could not agree that "the First Amendment invalidates the Act of Congress, and the laws of 48 of the 50 States, which make criminal the public burning of the flag." *Ibid.*⁴

Justice Stevens also dissented. 109 S. Ct. at 2555-2557. Given the "unique value" of the flag as a national symbol, Justice Stevens concluded that the government's interest in preserving that symbol certainly "supports a prohibition on the desecration of the American flag." *Id.* at 2557.

⁴ Analogizing Johnson's flag burning to the "fighting words" denied First Amendment protection in decisions such as *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), the Chief Justice stated that "it may equally well be said that the public burning of the American flag by Johnson was no essential part of any exposition of ideas, and at the same time it had a tendency to incite a breach of the peace," 109 S. Ct. at 2553. And he emphasized that the Texas statute "deprived Johnson of only one rather inarticulate symbolic form of protest—a form of protest that was profoundly offensive to many—and left him with a full panoply of other symbols and every conceivable form of verbal expression to express his deep disapproval of national policy." *Id.* at 2554. In other words, "in no way can it be said that Texas is punishing him because his hearers—or any other group of people—were profoundly opposed to the message that he sought to convey." *Ibid.*

B. The Flag Protection Act of 1989

1. The Court's decision in *Texas v. Johnson* immediately raised concerns in the Executive and Legislative Branches over the vitality of 18 U.S.C. 700 (a) (1988), the federal prohibition against desecration of the American flag. See note 1, *supra*. In *Johnson's* wake, Congress moved with considerable dispatch to protect the physical integrity of the American flag. See, e.g., 135 Cong. Rec. S7457 (daily ed. June 23, 1989) (statement of Sen. Biden). By mid-July 1989, a number of different proposals either to amend the federal statute or amend the Constitution had been introduced in both the Senate and the House of Representatives. See, e.g., S. Rep. No. 152, 101st Cong., 1st Sess. 6 (1989); H.R. Rep. No. 231, 101st Cong., 1st Sess. 2-3 (1989).

During the summer of 1989, the Judiciary Committees of both the House and Senate held extensive hearings with respect to the appropriate means of preserving a prohibition against flag burning. See *Statutory and Constitutional Responses to the Supreme Court Decision in Texas v. Johnson: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 101st Cong., 1st Sess. (1989) [*House Hearings*]; *Hearings on Measures to Protect the Physical Integrity of the American Flag: Hearings Before the Senate Comm. on the Judiciary*, 101st Cong., 1st Sess. (1989) [*Senate Hearings*]. Committee members heard widely divergent testimony from a variety of sources, including Members of Congress, concerned citizens, representatives of veterans' organizations, constitutional law scholars, prominent jurists and attorneys, and representatives from the

Department of Justice.⁵ As a result of those hearings, each Committee reported out a bill to amend the current federal statute in light of *Texas v. Johnson*.

2. The Senate bill, S. 1338, 101st Cong., 1st Sess. (1989), would have amended 18 U.S.C. 700(a) by deleting the element of "casts contempt upon" the flag. Instead, the Senate proposal would have made criminally liable "[w]hoever knowingly mutilates, defaces, burns, maintains on the floor or ground, or tramples upon any flag of the United States." S. Rep. No. 152, *supra*, at 16. The Committee Report explained that the Senate bill's purpose

is to protect the physical integrity of the American flag * * *. The subject matter of this legislation is unique, as the American flag has an historic and intangible value unlike any other symbol. * * *

S. Rep. No. 152, *supra*, at 2.

Furthermore, the report reflected the Committee's concerted effort to draft a bill consistent with the holding in *Texas v. Johnson*:

⁵ William P. Barr, Assistant Attorney General, Office of Legal Counsel, presented testimony on behalf of the Department of Justice. He explained the Department's position at length before both the House and Senate Judiciary Committees "that, in light of the expansive decision of the Court [in *Texas v. Johnson*], a statute simply would not suffice, and that the only way to ensure protection of the Flag is through a constitutional amendment." *House Hearings* 173; *Senate Hearings* 71; see *House Hearings* 166-199; *Senate Hearings* 64-99, 115-117. Attorney General Thornburgh reiterated that position in a letter submitted to the Senate Judiciary Committee. See *id.* at 118-119.

[U]nlike the law struck down in *Texas v. Johnson*—which was content-based—S. 1338 is content-neutral. Unlike the law struck down in *Texas v. Johnson*, whether one's treatment of the flag violates the amended Federal law would not depend on the likely communicative impact of the conduct. And unlike the law struck down in *Texas v. Johnson*, the amended Federal law is in fact "aimed at protecting the physical integrity of the flag in all circumstances."

S. Rep. No. 152, *supra*, at 10. The Committee recognized that its bill would likely face a constitutional challenge, but after weighing competing arguments, specifically concluded that the bill "would pass constitutional muster." S. Rep. No. 152, *supra*, at 15.

The House bill, H.R. 2978, 101st Cong., 1st Sess. (1989)—which, with minor changes, became the Flag Protection Act of 1989—expanded on the proposed Senate bill by including a different definition of "flag of the United States," an exception for disposing of a worn or soiled flag, and a provision for expedited judicial review. See H.R. Rep. No. 231, *supra*, at 1-2, 13-14; pp. 2-3, *supra*.⁶ Like its counterpart in the Senate, the Committee Report explained that the bill's purpose "is to protect the physical integrity of American flags." H.R. Rep. No. 231, *supra*, at 2.⁷ The Committee Report made clear that

⁶ Unlike its Senate counterpart, the House bill originally limited proscribed acts to "mutilates, defaces, burns, or tramples." See H.R. Rep. No. 231, *supra*, at 13. The House later accepted the Senate amendments and expanded the list of proscribed acts to include "physically defile[]" and "maintain[] on the floor or ground." See note 9, *infra*.

⁷ For that reason, the bill included an exception for disposal of a worn or soiled flag. As the Committee Report

the bill, like its counterpart in the Senate, was carefully considered and drafted in light of *Texas v. Johnson*:

The bill responds to [that] decision * * * by amending the current Federal flag statute to make it content-neutral: that is, the amended statute focuses exclusively on the conduct of the actor, irrespective of any expressive message he or she might be intending to convey. The bill serves the national interest in protecting the physical integrity of all American flags in all circumstances. This interest is "unrelated to the suppression of free expression." *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

H.R. Rep. No. 231, *supra*, at 2.⁸

3. On September 12, 1989, after a floor debate, the House of Representatives overwhelmingly passed

explained, "[w]hen a flag, through normal usage and the passage of time, has become worn or soiled, so that it is no longer a fitting emblem for display, the governmental interest in protecting its physical integrity no longer applies." H.R. Rep. No. 231, *supra*, at 9. The bill also narrowed the definition of a "flag of the United States" to avoid "infirmities of vagueness or overbreadth." H.R. Rep. No. 231, *supra*, at 12.

⁸ The Committee was aware that the bill would likely face constitutional challenges, and thus sought to minimize "the delay and uncertainty that might result from extended litigation to determine the constitutionality of the statute." H.R. Rep. No. 231, *supra*, at 10. Accordingly, the bill included an express provision for expedited review "[i]n order to achieve prompt Supreme Court review of the constitutionality of the revised federal flag protection law." H.R. Rep. No. 231, *supra*, at 10.

H.R. 2978, as reported out of committee, by a vote of 380 to 38. See 135 Cong. Rec. H5500-H5514, H5562 (daily ed. Sept. 12, 1989). As a result, the Senate proceeded to consider that bill, as opposed to S. 1338. See 135 Cong. Rec. S12,571 (daily ed. Oct. 4, 1989). And on October 5, the Senate, after adding two proscribed acts to the bill,⁹ overwhelmingly passed H.R. 2978, by a vote of 91 to 9. See 135 Cong. Rec. S12,655 (daily ed. Oct. 5, 1989). The amended bill was therefore returned to the House, where, on October 12, it was passed by a wide margin (371-43). See 135 Cong. Rec. H6997 (daily ed. Oct. 12, 1989). The President allowed the bill to become law without his signature on October 28, 1989.¹⁰

⁹ The Senate added to H.R. 2978, as passed by the House, the proscribed acts of "physically defile[]" and "maintain[]" on the floor or ground." See 135 Cong. Rec. S12,616-S12,619 (daily ed. Oct. 4, 1989); *id.* at S12,654-S12,655 (daily ed. Oct. 5, 1989). The House ultimately accepted those changes. See note 6, *supra*.

¹⁰ In his formal statement to Congress, the President expressly endorsed Congress's aim of achieving "our mutual goal of protecting our Nation's greatest symbol * * * from desecration." Statement on the Flag Protection Act of 1989, 25 Weekly Comp. Pres. Doc. 1619 (Oct. 26, 1989). At the same time, he stated his "serious doubts that [the legislation] can withstand Supreme Court review," and made clear his position "that a constitutional amendment is the only way to ensure that our flag is protected from desecration." *Ibid.*

Nevertheless, as the Court noted in *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981), "[t]he Congress is a coequal branch of government whose Members take the same oath we do to uphold the Constitution of the United States. * * * The cus-

C. Criminal Charges

1. *United States v. Eichman*

a. On October 30, 1989, appellees, Shawn D. Eichman, David Gerald Blalock, and Scott W. Tyler, participated in a demonstration outside the Capitol, in Washington, D.C.¹¹ That demonstration, occurring shortly after the Flag Protection Act of 1989 became effective, was hailed as a "CHALLENG[E]" to that statute. J.A. 55. As stated in a leaflet distributed at the rally:

The battle lines are drawn. On one side stands the government and all those in favor of compulsory patriotism and enforced rever[e]nce to the flag. On the other side are all those[] opposed to this. And to all the oppressed we have this to say also. This flag means one thing to the powers that be and something else to all of us. Everything bad this system has done and continues to do to people all over the world has

tomary deference accorded the judgments of Congress is certainly appropriate when, as here, Congress specifically considered the question of the Act's constitutionality." Cf. *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam); *id.* at 727-730 (Stewart, J., concurring); *id.* at 730-740 (White, J., concurring). Under such circumstances, the Executive Branch enforced the statute and fulfilled its obligation to "take care that the Laws be faithfully executed." U.S. Const. Art. II, § 3. And it is our position in this Court that the Court should uphold the constitutionality of the Flag Protection Act because of Congress's determination regarding the weight of the governmental interest at stake and because the proscribed conduct, even when undertaken for communicative purposes, should not fall within the protection of the First Amendment.

¹¹ Since the district court granted appellees' pretrial motion to dismiss the flag-burning charges, the pertinent facts are not disputed. See 89-1433 J.S. App. 2a.

been done under this flag. No law, no amendment will change it, cover it up, or stifle [*sic*] that truth. So to you we say, Express yourself! Burn this flag. It's quick, it's easy, it may not be the law, but it's the right thing to do.

J.A. 56; see 89-1433 J.S. App. 2a & n.1. During that demonstration, appellees each set an American flag on fire; those flags were incinerated. 89-1433 J.S. App. 2a-3a; see Declaration of Edward L. Bailor (Jan. 1, 1990), Attachment A at 1, to U.S. Mem. in Opp. to Defendants' Mot. to Dismiss, *United States v. Eichman*, Cr. No. 89-419 (D.D.C. filed Jan. 12, 1990).

b. On October 31, 1989, the United States Attorney for the District of Columbia filed separate criminal informations charging each appellee with one count of knowingly burning a flag of the United States, in violation of 18 U.S.C. 700(a) (as amended). J.A. 31-33.¹²

On December 5, 1989, appellees filed a joint motion to dismiss the criminal informations. Appellees contended that the Flag Protection Act of 1989, both on its face and as applied to their particular conduct, could not withstand the stringent standard of

¹² Gregory Johnson, whose state criminal conviction culminated in *Texas v. Johnson*, had also participated in the demonstration at the Capitol. Johnson tried to burn an American flag, but that attempt was foiled when a police officer grabbed the flag out of Johnson's hands before he could set it ablaze. As a result, the United States Attorney declined to charge Johnson with violating the Flag Protection Act. See 89-1433 J.S. App. 2a-3a & n.4; U.S. Mem. in Opp. to Defendants' Mot. to Dismiss at 2 n.3, *United States v. Eichman*, Cr. No. 89-419 (D.D.C. filed Jan. 12, 1990).

review mandated by *Texas v. Johnson*, and therefore violated the First Amendment.¹³

2. *United States v. Haggerty*

a. On October 28, 1989, appellees, Mark John Haggerty, Carlos Garza, Jennifer Proctor Campbell, and Darius Allen Strong, participated in a rally outside a post office in Seattle, Washington.¹⁴ That rally, scheduled to begin precisely when the Flag Protection Act of 1989 became effective, was advertised as a "Festival of Defiance." 89-1434 J.S. App. 5a n.3. As stated in a leaflet publicizing the event:

On October 28th it becomes illegal to desecrate the flag. This fascist law is not an "exception" to the concept of free speech but an attack on political protest and dissent, and a precedent for the future. Blind patriotism must not be the law of the land. Unlike the flag-kissers, we will not whine, we will Rock & Roll in a Festival of Defiance.

J.A. 79; see 89-1434 J.S. App. 5a-6a n.3. During that rally, an American flag belonging to the United States Postal Service was taken down from the flagpole outside the post office. Appellees then set that flag on fire and raised it back up the flagpole, where

¹³ The United States Senate, through the Senate Legal Counsel, and the Speaker of the House of Representatives (representing the Democratic Leadership), through the General Counsel to the Clerk of the House, each filed a brief amicus curiae in opposition to appellees' motion.

¹⁴ As in *Eichman*, since the district court granted appellees' pretrial motion to dismiss the flag-burning charge, the pertinent facts are not disputed. See 89-1434 J.S. App. 2a.

it became almost completely charred. 89-1434 J.S. App. 2a; see J.A. 36-40.¹⁵

b. On November 28, 1989, the United States Attorney for the Western District of Washington filed a criminal information charging appellees with one count of willfully injuring property of the United States, in violation of 18 U.S.C. 1361 and 2, and one count of knowingly burning a flag of the United States, in violation of 18 U.S.C. 700(a), as amended by the Flag Protection Act of 1989. J.A. 34-35.

On January 18, 1990, appellees filed a joint motion to dismiss the flag-burning charge.¹⁶ Appellees contended that the Flag Protection Act of 1989, both on its face and as applied to their particular conduct, could not withstand the stringent standard of review mandated by *Texas v. Johnson*, and therefore violated the First Amendment.¹⁷

D. The District Court Decisions

In separate decisions issued in February and March 1990,¹⁸ the district courts in *Eichman* and

¹⁵ A composite videotape of the rally, which is part of the record, see J.A. 36-37 (¶ 6), shows that acts of violence occurred during the course of these events.

¹⁶ Appellees also filed a motion to dismiss the entire information because of prosecutorial misconduct. 89-1434 J.S. App. 2a n.1. The district court denied that motion on February 28, 1990, after the notice of appeal had been filed. See J.A. 30.

¹⁷ As in *Eichman*, the United States Senate, through the Senate Legal Counsel, and the Speaker of the House of Representatives (representing the Democratic Leadership), through the General Counsel to the Clerk of the House, each filed a brief amicus curiae in opposition to appellees' motion.

¹⁸ The district courts in both *Eichman* and *Haggerty* engaged in a substantially similar analysis in striking down the

Haggerty granted appellees' motions to dismiss the flag-burning charges, holding that the Flag Protection Act of 1989, as applied to appellees' conduct, violated the First Amendment. 89-1433 J.S. App. 1a-18a; 89-1434 J.S. App. 1a-16a.¹⁰ As a threshold matter, the court in *Eichman* concluded that appellees' "flag-burning constitutes expressive conduct of an overtly political nature, and thus implicates the First Amendment." 89-1433 J.S. App. 10a; accord 89-1434 J.S. App. 5a.

Turning to the applicable standard of review, the district court in *Eichman* determined that, under *Texas v. Johnson*, courts must apply strict scrutiny. Here, like the State's purpose in outlawing flag desecration in *Texas v. Johnson*, the "underlying purpose [of the the Flag Protection Act] is to preserve the flag's symbolic value." 89-1433 J.S. App. 10a. The court therefore concluded that the Act "relates to the suppression of expression and should be

Flag Protection Act as applied to appellees' flag burning. For that reason, we refer the Court to the *Eichman* decision and provide citations to the corresponding portions of the *Haggerty* decision.

¹⁰ For that reason, the district courts did not address appellees' claims that the statute was unconstitutional on its face. 89-1433 J.S. App. 15a n.9; 89-1434 J.S. App. 2a, 15a.

On March 20, 1990, after the notice of appeal had been filed, the district court in *Haggerty* purported to issue an amended memorandum decision. Apart from minor editorial or stylistic changes, the district court added the following concluding footnote: "Given this result, the court need not address [appellees'] other argument that the Flag Protection Act is unconstitutional on its face." Amended Mem. Dec. at 17 n.8, *United States v. Haggerty*, No. CR 89-315-R (W.D. Wash. Mar. 20, 1990).

scrutinized rigorously." 89-1433 J.S. App. 11a; accord 89-1434 J.S. App. 10a.²⁰

The Senate, as amicus curiae, contended that the governmental interest underlying the Flag Protection Act was not related to the suppression of expression, because Congress was seeking "to protect the physical integrity of the flag to preserve it as a universal symbol, embodying a diversity of views." 89-1433 J.S. App. 12a; accord 89-1434 J.S. App. 10a. The district court in *Eichman* rejected that argument, explaining that

[i]t makes no difference whether we describe [the flag] as a political symbol, or a symbol of the nation and nationhood, or the symbol under which a pluralistic society can strive to find common ground. For in protecting the flag for those who wish to waive [sic] it in support of these causes, but preventing the defendants from burning it in opposition, the government has created a regulation which cannot be justified without reference to the content of the defendants' message.

89-1433 J.S. App. 14a; accord 89-1434 J.S. App. 10a-11a. In the court's view, the statute's "restriction, as applied to [appellees], is content-based and is subject to strict scrutiny." 89-1433 J.S. App. 14a; accord 89-1434 J.S. App. 11a.²¹

²⁰ The United States agreed with appellees that, under *Texas v. Johnson*, the Flag Protection Act was subject to strict scrutiny, as opposed to the more lenient *O'Brien* standard of review. 89-1433 J.S. App. 11a; 89-1434 J.S. App. 8a.

²¹ In *Haggerty*, the district court rejected as constitutionally irrelevant the fact that the Flag Protection Act "leaves open ample alternative channels for communication in that it does not prohibit protest against governmental

The House of Representatives, as *amicus curiae*, took a different approach, contending that the governmental interest underlying the Flag Protection Act was not related to the suppression of expression, because Congress sought "to protect the state's sovereign interest in the flag." 89-1433 J.S. App. 14a; accord 89-1434 J.S. App. 12a. The district court in *Eichman* dismissed that argument on two grounds: first, "the legislative history of the Act does not contain a single reference to the Congress' alleged sovereignty interest," 89-1433 J.S. App. 15a; accord 89-1434 J.S. App. 12a, and second, "[t]he government's only possible interest in protecting the physical integrity of the flag as an incident of sovereignty is to prevent or punish acts of disrespect amounting to a rejection of United States sovereignty," 89-1433 J.S. App. 15a; accord 89-1434 J.S. App. 12a-13a.

Applying strict scrutiny, the district court in *Eichman* concluded that "the government's interest in protecting the physical integrity of the flag to preserve its symbolic value is [not] sufficiently compelling to justify convicting [appellees] for burning United States flags." 89-1433 J.S. App. 15a; accord 89-1434 J.S. App. 14a. The court observed that in *Texas v. Johnson*, this Court stated that "the government may not foster its own view of the flag by prohibiting expressive conduct relating to it," 89-1433 J.S. App. 16a (quoting *Texas v. Johnson*, 109 S. Ct. at 2545); accord 89-1434 J.S. App. 14a. And

policies in other ways." 89-1434 J.S. App. 11a n.6 (citing *Spencer v. Washington*, 418 U.S. 405, 411 n.4 (1974)).

In *Haggerty*, the district court also declined to uphold the Flag Protection Act on the ground that the statute "was not aimed at protecting the physical integrity of the flag in all circumstances," since the Act failed to do so. 89-1434 J.S. App. 11a n.6.

the court decided that *Texas v. Johnson* foreclosed the government's claim that Congress, on behalf of the Nation, has a "sufficiently compelling [interest in preserving the flag as a national symbol] to survive strict scrutiny." 89-1433 J.S. App. 16a; accord 89-1434 J.S. App. 14a.²²

SUMMARY OF ARGUMENT

I. In *Texas v. Johnson*, 109 S. Ct. 2533 (1989), the Court held that a Texas statute outlawing desecration of venerated objects, as applied to the burning of an American flag, violated the First Amendment. By contrast, these cases involve the Flag Protection Act of 1989, a federal statute enacted in response to *Texas v. Johnson*, under circumstances in which Congress was mindful of the First Amendment's express strictures. The Court has long acknowledged "[t]he customary deference accorded judgments of Congress," particularly where, as here, "Congress specifically considered the question of the Act's constitutionality." *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981). In light of that established principle—and Congress's determination of the harm inflicted by burning of the flag—the courts below misconstrued *Texas v. Johnson* as essentially foreclosing the constitutionality of the Flag Protection Act.

The pertinent constitutional analysis should focus on the sort of expressive conduct at issue here—

²² In *Haggerty*, the district court, once notified of the government's intention to take an interlocutory appeal to this Court, rescinded its order scheduling trial for February 26 on the remaining count of willfully injuring property of the United States, pending final disposition of the appeal. Order, *United States v. Haggerty*, No. CR 89-315-R (W.D. Wash. Feb. 21, 1990).

flag burning (and other physical assaults on the flag) and then take into account the national consensus underlying the statute—that physical destruction of the American flag, the unique symbol of the Nation, constitutes a violent assault on the shared values that bind our national community. When viewed from the proper constitutional perspective, the Flag Protection Act fully comports with the First Amendment.

II. The United States does not dispute that appellees' flag burning constitutes expressive conduct. Nor does the United States dispute that Congress enacted the Flag Protection Act in order to protect the physical integrity of the flag under all circumstances and thus necessarily to encompass within its prohibition that narrow category of "symbolic speech"—expressive conduct that involves mishandling the American flag to convey a message. But this does not doom Congress's considered judgment in passing this measure. The First Amendment does not prohibit Congress, as it provided in the Flag Protection Act, from removing the American flag as a prop available to those who seek to express their own views by destroying it.

This Court has never assumed that all speech, including expressive conduct, is entitled to full First Amendment protection; to the contrary, the Court over the years has identified a variety of categories of expression as beyond the pale of "the freedom of speech." Such categories of expression, the Court has observed, "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 582 (1942). The Court's decisions show

that the protections of the First Amendment do not apply where (1) the speech (or expressive conduct) is narrowly and precisely defined, (2) whatever value the expression may have to the speaker (or others) is outweighed by its demonstrable destructive effect on society as a whole or on particular overarching social policies, and (3) the speaker has suitable alternative means to express (and others have means to receive) whatever protected expression may be part of the intended message.

These constraining principles of First Amendment analysis apply to appellees' burning of a flag of the United States. Congress and the President—the Nation's elected representatives—have now spoken with one voice: the physical integrity of the flag of the United States, as the unique symbol of the Nation, merits protection not accorded other national emblems. The reason is this: Flag burning is, by its nature, a physical, violent assault on the most deeply shared experiences of the American people, including the sacrifices of our fellow citizens in defense of the Nation and the preservation of liberty. It is the physical assault and accompanying violation of the flag's physical integrity—not robust and uninhibited debate—that occasion the injury that our society should not be called upon to bear.

For these reasons, the Court should treat the conduct at issue—physical destruction of a flag of the United States—as it has other narrowly defined categories of expressive conduct that have not merited full protection under the First Amendment. Flag burning, like obscene materials, defamatory statements and a variety of other "speech" or expressive conduct, presents substantial "evils" incompatible with "the very purpose for which organized gov-

ernments are instituted,” *Texas v. Johnson*, 109 S. Ct. at 2555 (Rehnquist, C.J., dissenting). In view of the inherently destructive nature of flag burning, the system of free expression ordained by the First Amendment is not compromised by a highly specific, narrowly tailored prohibition on physical attacks upon the flag.

These cases therefore call for the Court to reconsider the assumption in *Texas v. Johnson* that flag burning is a form of expressive conduct meriting full First Amendment protection. Reconsideration of that premise is particularly appropriate where, as here, the people’s elected representatives have made the considered decision that (save for a specific and well-recognized exception) the physical destruction of the flag is—uniquely—anathema to the Nation’s values.

Although the act of burning an American flag falls outside the scope of protected speech under the First Amendment, a governmental prohibition on such conduct must still withstand judicial scrutiny since the proscribed conduct will, as here, likely be accompanied by otherwise fully protected expression. The Flag Protection Act, drafted by Congress to preclude a circumscribed type of conduct, fully ensures that only unprotected expression will be prosecuted. There is, thus, no danger that any individual would be prosecuted under the statute for what the person says about the flag. Cf. *Street v. New York*, 394 U.S. 576 (1969).

III. Our submission is, we recognize, in tension with certain doctrinal underpinnings of the Court’s recent decision in *Texas v. Johnson*. The Court there, of course, had no occasion to address, much less weigh for constitutional purposes, the sort of *Congressional* determination regarding the need to protect the

American flag that led to enactment of the Flag Protection Act. Moreover, the Court was faced with a statute, unlike the federal measure (as now amended), that prohibited acts that “the actor knows will seriously offend one or more persons * * *.” Texas Penal Code § 42.09(b) (1974). To the extent that *Johnson* accorded flag burning, as expressive conduct, full First Amendment protection—as the courts below construed that decision and as appellees urge before this Court—*Texas v. Johnson* should be reconsidered and, upon reconsideration, appropriately limited.

ARGUMENT

THE FIRST AMENDMENT DOES NOT PROHIBIT THE UNITED STATES FROM PROSECUTING APPELLEES FOR KNOWINGLY BURNING FLAGS OF THE UNITED STATES IN VIOLATION OF THE FLAG PROTECTION ACT OF 1989

I. *TEXAS v. JOHNSON* DOES NOT FORECLOSE THE VALIDITY OF THE FLAG PROTECTION ACT OF 1989 IN LIGHT OF CONGRESS’S CONSIDERED LEGISLATIVE JUDGMENT THAT THERE IS A COMPELLING NATIONAL INTEREST IN PROTECTING THE FLAG

In *Texas v. Johnson*, 109 S. Ct. 2533 (1989), a sharply divided Court held that a Texas statute outlawing desecration of venerated objects, as applied to the burning of an American flag, violated the First Amendment. In so holding, the Court stressed one infirmity of that state law provision—the law “reache[d] only those severe acts of physical abuse of the flag carried out in a way likely to be offensive.” *Id.* at 2543. In addition, the *Johnson* Court emphasized the narrowness of the question it was deciding. See *id.* at 2544 n.8 (“Our inquiry is, of course, bounded by the particular facts of this case

and the statute under which Johnson was convicted.”).

By contrast, these cases involve the Flag Protection Act of 1989, a federal statute enacted in response to *Texas v. Johnson*, under circumstances in which Congress was mindful of the First Amendment’s stricture that “Congress shall make no law * * * abridging the freedom of speech * * *.” U.S. Const. Amend. I. Congress drafted the statute within this constitutional framework, making a considered legislative determination that the American flag is a unique national symbol deserving special protection consistent with applicable First Amendment limitations.

The Court has long acknowledged that “[w]hen-ever called upon to judge the constitutionality of an Act of Congress—‘the gravest and most delicate duty that this Court is called upon to perform,’ *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (Holmes, J.)—the Court affords ‘great weight to the decisions of Congress.’” *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981) (quoting *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 102 (1973)). That established principle applies even though legislation may implicate fundamental constitutional rights guaranteed by the First Amendment. *Columbia Broadcasting System, Inc. v. Democratic National Committee*, *supra*; see *Fullilove v. Klutznick*, 448 U.S. 448, 472 (1980) (opinion of Burger, C.J.). To be sure, as this Court has stated, “[d]eference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake.” *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843 (1978). Nevertheless, “[t]he customary deference accorded the judgments of Congress is certainly appropriate when * * * Congress spe-

cifically considered the question of the Act’s constitutionality.” *Rostker v. Goldberg*, 453 U.S. at 64; see *United States v. Watson*, 423 U.S. 411, 421-423 (1976).

In light of these established principles, the courts below misconstrued *Texas v. Johnson* as essentially foreclosing the constitutionality of the Flag Protection Act. See 89-1433 J.S. App. 15a-16a; 89-1434 J.S. App. 14a-15a. Instead, as we set forth below, the pertinent constitutional analysis should focus on the sort of expressive conduct at issue here—flag burning—and then take into account the national consensus underlying the Flag Protection Act—that physical destruction of the American flag, the unique symbol of the Nation, constitutes a violent assault on the shared values that bind our national community. Absent from the backdrop of *Texas v. Johnson* was the testament to the depth of the national interest in protecting the flag that is embodied in the Flag Protection Act, and the considered judgment of Congress—as opposed to that of a single state legislature—that it was critically important to vindicate that interest in the wake of this Court’s decision with respect to the Texas statute. When viewed from the proper constitutional perspective, the Flag Protection Act fully comports with the First Amendment.²³

²³ Congress attempted to respond to the constitutional shortcomings noted by the Court in striking down the Texas statute. In particular, Congress regarded the Flag Protection Act as content-neutral, reasoning that the statute protects the flag from physical damage regardless of the content of the message the actor wishes to convey by destroying it. See 89-1433 J.S. App. 13a; 89-1434 J.S. App. 9a; pp. 9-13, *supra*. Cf. *Texas v. Johnson*, 109 S. Ct. at 2543 (strict scrutiny applied since “Johnson’s political expression was restricted because of the content of the message he conveyed”). As the district courts noted, however, protecting the flag from

II. SINCE PHYSICAL DESTRUCTION OF A FLAG OF THE UNITED STATES FALLS OUTSIDE THE SCOPE OF PROTECTED EXPRESSIVE CONDUCT UNDER THE FIRST AMENDMENT, THE FLAG PROTECTION ACT'S NARROW PROHIBITION SATISFIES APPLICABLE CONSTITUTIONAL STANDARDS

The United States does not dispute that appellees' flag burning constitutes expressive conduct. See, e.g., *Texas v. Johnson*, 109 S. Ct. at 2539-2540; *Spence v. Washington*, 418 U.S. 405, 409-410 (1974). Indeed, the record makes plain that appellees' actions were part of organized political demonstrations—protests aimed at any number of current social and political issues. See 89-1433 J.S. App. 2a-3a; 89-1434 J.S. App. 2a, 5a & n.3; J.A. 46-67, 74-84. Nor does the United States dispute that Congress enacted the Flag Protection Act in order to protect the physical integrity of the flag under all circumstances and thus necessarily to encompass within its prohibition that narrow category of “symbolic speech”—expressive conduct that involves destruction (or mishandling) of the American flag to convey any given message. Indeed, that is precisely the purpose of this

anyone who “mutilates, defaces, physically defiles, burns, maintains [it] on the floor or ground, or tramples upon [it],” 18 U.S.C. 700(a) (1) (as amended), is implicitly (if not explicitly) based on a view that the flag stands for something valuable, and should be safeguarded because of that value. The significance, in terms of First Amendment doctrine, of Congress's action lies in its articulation of the compelling governmental interest in protecting the flag and the extension of that protection to all acts of destruction of the flag's physical integrity, a scope of protection which necessarily encompasses acts of expressive conduct, such as appellees' flag burning.

criminal provision. As the Senate Judiciary Committee explained:

The flag has stood as the unique and unalloyed symbol of the Nation for more than 200 years. In seeking to protect its physical integrity, Congress is simply ratifying the unique status conferred upon the flag by virtue of its historic function as the emblem of this Nation.

S. Rep. No. 152, *supra*, at 3; see H.R. Rep. No. 231, *supra*, at 9.

But this does not doom Congress's considered judgment in passing this measure. As this Court has acknowledged, “to say the [Act] presents a First Amendment *issue* is not necessarily to say that it constitutes a First Amendment *violation*.” *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 803-804 (1984). That is so because the Court has long recognized, in a wide variety of contexts, “that the unconditional phrasing of the First Amendment was not intended to protect every utterance.” *Roth v. United States*, 354 U.S. 476, 483 (1957). And the Court has made clear that the “Government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word.” *Texas v. Johnson*, 109 S. Ct. at 2540; cf. *United States v. O'Brien*, 391 U.S. 367, 376-377 (1968).

In these cases, the courts below overvalued, for purposes of the First Amendment, the narrow category of expressive conduct at stake, and undervalued the compelling governmental interest—expressly identified by both the Congress and the President—that lies at the core of the statute: the preservation of the flag as the unique symbol of our Nation.²⁴ In

²⁴ In *Haggerty*, appellees are charged with burning a flag of the United States that belonged to the United States Postal

our view, the First Amendment does not prohibit Congress from removing the American flag as a prop available to those who would express their own views by destroying it.

In a long line of established precedent, the Court has "laid the foundation for the excision of [certain speech] from the realm of constitutionally protected expression." *New York v. Ferber*, 458 U.S. 747, 754 (1982). It is not, nor has it ever been, the law that all expression—much less all expressive conduct—is protected by the broad sweep of the First Amendment. The Court has often set its face against vari-

Service. 89-1434 J.S. App. 2a. In *Texas v. Johnson*, the Court expressly left open the question whether an individual may be prosecuted for burning a flag after he had stolen it. 109 S. Ct. at 2544 n.8; see *id.* at 2557 (Stevens, J., dissenting); see also note 3, *supra*. In our view, the Flag Protection Act, as applied to appellees' particular conduct, i.e., burning an American flag that is property of the United States, is plainly constitutional. Indeed, in *Spence v. Washington*, 418 U.S. 405, 409 (1974), the Court stated that "[w]e have no doubt that the State or National Governments constitutionally may forbid anyone from mishandling in any manner a flag that is public property."

Nevertheless, the statute, as drafted by Congress, is not readily "subject to such a limiting construction," *New York v. Ferber*, 458 U.S. 747, 769 n.24 (1982), and we do not urge the Court to resolve *Haggerty* on that ground. As the district court in *Haggerty* apparently concluded, the statute is still susceptible to a substantial overbreadth challenge under the First Amendment, and thus this Court must consider the statute's application to the destruction of flags that do not happen to be federal property—the circumstances presented in the consolidated appeal in *Eichman*. See *New York v. Ferber*, 458 U.S. at 766-773; *Broadrick v. Oklahoma*, 413 U.S. 601, 611-615 (1973); cf. *Massachusetts v. Oakes*, 109 S. Ct. 2633, 2637 (1989) (plurality opinion); *id.* at 2640-2641 (Scalia, J., concurring in the judgment in part and dissenting in part); *id.* at 2642 (Brennan, J., dissenting).

ous forms of expression that have marginal utility in our system of free expression and which occasion (or threaten) cognizable harm. In so doing, the Court has carefully evaluated the nature of the First Amendment interests at stake and excepted from the ambit of constitutional protection a variety of categories of speech and expressive conduct.

The First Amendment, in other words, is not value free. To the contrary, the libertarian model of First Amendment analysis, although demonstrably the prevalent theme in the Court's modern jurisprudence, has not swept all competing themes off the constitutional board. The marketplace of ideas, like other markets, has limits.

A. This Court has identified a variety of categories of expression as being beyond the pale of First Amendment protection.²⁵ See, e.g., *New York v. Ferber*, *supra* (child pornography); *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982) (speech promoting illegal activity); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (defamation); *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973) (speech promoting illegal activity); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (speech likely to incite violence); *Roth v. United States*, 354 U.S. 476 (1957) (obscenity); *Chaplinsky v. New Hampshire*,

²⁵ As summarized by the Court over a generation ago:

There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting words"—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-572 (1942).

315 U.S. 568 (1942) (fighting words). Such categories of expression, the Court has observed, "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Chaplinsky v. New Hampshire*, 315 U.S. at 572. In other words,

it is not rare that a content-based classification of speech has been accepted because it may be appropriately generalized that within the confines of a given classification, the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required.

New York v. Ferber, 458 U.S. at 763-764; see *Whitney v. California*, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring). As both the express language of *Ferber* and the range of cases cited above show, considering whether the expressive activity at issue is outside the "freedom of speech" protected by the First Amendment—on the basis of its content—is hardly an "unprecedented theory." Appellees' Mem. at 10.

To be sure, the Court has consistently recognized "the inherent dangers of undertaking to regulate any form of expression." *Miller v. California*, 413 U.S. 15, 23 (1973). But acknowledging "the shared values of a civilized social order," *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986), the Court has refused to accord certain narrow, well-defined types of speech full First Amendment protection.²⁶ As decisions such as *Ferber* suggest, the

²⁶ The Court has upheld restrictions on speech, despite the apparent reach of the First Amendment, on any number of

protections of the First Amendment do not apply where (1) the speech (or expressive conduct) is narrowly and precisely defined, (2) whatever value the expression may have to the speaker (or others) is outweighed by its demonstrable destructive effect on society as a whole or on particular overarching social policies, see, e.g., *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980) (false and misleading commercial speech); *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969) (employer's anti-union statements before representation election), and (3) the speaker has suitable alternative means to express (and others have means to receive) whatever protected expression may be part of the intended message, cf. *Austin v. Michigan State Chamber of Commerce*, No. 88-1569 (Mar. 27, 1990), slip op. 7 (restrictions on corporate funds for political speech); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986) (restrictions on exhibition of "adult films").²⁷

occasions. See, e.g., *Austin v. Michigan State Chamber of Commerce*, No. 88-1569 (Mar. 27, 1990) (corporate expenditures in support of political candidates); *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 783 (1985) (speech in nonpublic forum); *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985) (speech subject to copyright); *Connick v. Myers*, 461 U.S. 138 (1983) (speech of public employees); *Snepp v. United States*, 444 U.S. 507 (1980) (per curiam) (speech disclosing confidential information); *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) (indecent speech on public airwaves).

²⁷ In both *Texas v. Johnson*, 109 S. Ct. at 2546 n.11, and *Spence v. Washington*, 418 U.S. at 411 n.4, the Court declined consideration of alternative means of expression, in the context of holding that the First Amendment protected symbolic speech involving the American flag. But the Court has by no means reflexively eschewed an alternative means analysis,

B. That constraining principle of the First Amendment applies to the conduct at issue—appellees’ burning of a flag of the United States. Congress, which by design takes into account the interests of all citizens, see *The Federalist* No. 10, at 77 (J. Madison) (C. Rossiter ed. 1961), and the President, who is “elected by all the people,” *Myers v. United States*, 272 U.S. 52, 123 (1926), have now spoken with one voice—the flag of the United States, as the unique symbol of the Nation, merits protection not accorded other national emblems.

As the Senate Judiciary Committee explained:

The flag has stood as the unique and unalloyed symbol of the Nation for more than 200 years.

nor should it do so here. To the contrary, just the other day, that very approach figured prominently in the Court’s analysis in a case involving restrictions on core political speech. In *Austin v. Michigan State Chamber of Commerce*, No. 88-1569 (Mar. 27, 1990), the Court upheld a restriction on use of general corporate funds for political speech, noting that “the Act does not impose an *absolute* ban on all forms of corporate political spending but permits corporations to make independent political expenditures through separate segregated funds.” Slip op. 7. (emphasis in original). If alternatives suffice when it comes to a non-profit corporation’s desire to speak in favor of a political candidate, it is not clear to us why they should not suffice when it comes to appellees’ desire to destroy the flag to convey a particular message.

Moreover, *Texas v. Johnson* assumed that flag burning merited full First Amendment protection. That assumption was not compelled by prior precedent, since the Court had previously never held that the First Amendment applied with full force to the physical destruction of the flag itself, as opposed to otherwise protected speech incident to such conduct. See *Spence v. Washington*, 418 U.S. at 414-415; *Smith v. Goguen*, 415 U.S. 566, 582 & n.32 (1974); *Street v. New York*, 394 U.S. 576, 594 (1969).

In seeking to protect its physical integrity, Congress is simply ratifying the unique status conferred upon the flag by virtue of its historic function as the emblem of this Nation.

S. Rep. No. 152, *supra*, at 3. The House Judiciary Committee echoed those findings:

[The prohibition against flag burning] recognizes the diverse and deeply held feelings of the vast majority of citizens for the flag, and reflects the government’s power to honor those sentiments through the protection of a venerated object.

H.R. Rep. No. 231, *supra*, at 9. And the President expressly endorsed Congress’s aim of achieving “our mutual goal of protecting our Nation’s greatest symbol * * * from desecration.” Statement on the Flag Protection Act of 1989, 25 Weekly Comp. Pres. Doc. at 1619.

In *Spence v. Washington*, 418 U.S. at 413, the Court eloquently foreshadowed the motivating force behind the Flag Protection Act:

For the great majority of us, the flag is a symbol of patriotism, of pride in the history of our country, and of the service, sacrifice, and valor of the millions of Americans who in peace and war have joined together to build and to defend a Nation in which self-government and personal liberty endure. It evidences both the unity and diversity which are America.

And that representative consensus identifies the substantial potential harm posed by wanton physical destruction of the American flag.²⁸

²⁸ Indeed, Congress originally enacted the predecessor statute in 1968 based on its finding that “[p]ublic burning, de-

Flag burning, in our view, represents more than a weakening or erosion of community values. Cf. *Miller v. California*, 413 U.S. at 19 (obscenity “carries with it a significant danger of offending the sensibilities of unwilling recipients”). As *Spence*’s description suggests, flag burning (or other forms of destruction or mutilation) is a physical, violent assault on the most deeply shared experiences of the American people, including the sacrifices of our fellow citizens in defense of the Nation and the preservation of liberty. As a powerful indication of its uniqueness, eloquently articulated by the political branches and this Court, the flag is inextricably tied in the national consciousness—especially in this Century—to the loss of American lives in service to their country and the cause of freedom. The flag stands as the most profound reminder that a physical assault on the Nation’s unique symbol of community amounts, in the minds of the members of the community (and their elected representatives), to an assault on the memory of those who have sacrificed for the national community. It is a violent, destructive assault of far greater moment and injury to the national community than that occasioned by a mere verbal assault on a public official, such as saying to the Town Marshal of Rochester, New Hampshire, that the official is a “racketeer” or “Fascist.” See *Chaplinsky v. New Hampshire*, 315 U.S. at 569. It is the physical assault—the physical

struction, and dishonor of the national emblem inflict[] an injury on the entire Nation.” S. Rep. No. 1287, 90th Cong., 1st Sess. [sic; 2d] 3 (1968). It is thus not surprising that the Court in *Spence* described in detail *Spence*’s conduct in taking no action that would injure or destroy the flag which he displayed in his apartment window. See *Spence v. Washington*, 418 U.S. at 406-409, 414-415.

attack—and the accompanying violation of the flag’s physical integrity that occasion the injury that society should not be called upon to bear.

To be sure—indeed to be emphatic—the flag is not above criticism, including the most robust and uninhibited criticism, just as the Town Marshal victimized by Mr. Chaplinsky’s verbal assault was not above criticism. But there is a line.²⁹ A line—difficult to draw but discernible by virtue of common human experience—unmistakably exists between expressions of political opinion (entitled to the most stringent First Amendment safeguards in the marketplace of ideas) and a verbal assault on an official’s basic human dignity.³⁰

Appellees here chose not only to speak, to confront, to lecture, and to challenge orthodox ideas, as was

²⁹ Basic humanity in our corporate life together requires a certain level of decency and civility in discourse. It requires basic human respect. That is what *Chaplinsky* and the defamation cases are, at bottom, all about. In the view of the United States, a destructive, physical assault on the flag itself goes beyond that level of decency, civility, and respect in discourse which merits constitutional protection. Civility in the exercise of expressive conduct has been specifically noted in this Court’s decisions. See, e.g., *Tinker v. Des Moines School Dist.*, 393 U.S. 503, 507-514 (1969); *Brown v. Louisiana*, 383 U.S. 131, 133-140 (1966) (opinion of Fortas, J.); *id.* at 150-151 (opinion of White, J.).

³⁰ If concern for the moral sensibility of the community warrants exclusion of obscene materials from First Amendment protection, as it does, and if concerns for human dignity occasioned by injury to an individual’s reputation warrant leaving in place (save for well-recognized exceptions) the law of defamation, as they do, then concern for the shared moral values of the community should allow for the one—indeed the unique—symbol of the community’s corporate existence to stand above the fray of physical assault and destruction.

their bedrock constitutional right, they also chose to destroy and physically to tear apart. They were, we acknowledge, expressing an "idea" through their acts of destruction, just as Mr. Chaplinsky expressed an "idea"—indeed, a core political idea—in upbraiding the hapless Town Marshal and the Marshal's colleagues in the Rochester town government. But a pure libertarian vision of our system of free expression has never commanded this Court's decisions; the Court should not now create an anomaly in its First Amendment jurisprudence by transforming such "immature antic[s]," *Smith v. Goguen*, 415 U.S. 566, 590 (1974) (Blackmun, J., dissenting), into protected "speech" and thereby strike down an Act of Congress enacted with the deepest respect and assiduous concern for this Court's teachings.

For these reasons, the Court should treat the conduct at issue—physical destruction of a flag of the United States—as it has such other narrowly defined categories of expressive conduct that have not merited full protection under the First Amendment. Flag burning, like obscene materials, speech proposing an illegal activity, perjury, and defamatory statements,³¹ presents substantial "evils" incompatible with "the very purpose for which organized governments are instituted," *Texas v. Johnson*, 109 S. Ct. at 2555 (Rehnquist, C.J., dissenting). And, such conduct (at most) involves "expressive interests" which, given the availability of other means of expression, are "overwhelmingly outweigh[ed]" by the identified harm. *New York v. Ferber*, 458 U.S. at 763,

³¹ Such statements, of course, fit more literally than flag burning within the text of the First Amendment, yet they have been deemed unworthy of protection and thus not to constitute a component of "the freedom of speech" protected by the First Amendment.

764. Considered within this analytical framework, the Flag Protection Act is fully consistent with the First Amendment.³²

This is especially true since the system of free expression ordained by the First Amendment is not compromised by a highly specific, narrowly tailored prohibition of physical attacks upon and destruction of the flag. Indeed, before *Texas v. Johnson*, individual Members of the Court had expressed the view that the government could constitutionally outlaw physical destruction of the flag consistently with the First Amendment. See *Spence v. Washington*, 418 U.S. at 416-423 (Rehnquist, J., joined by Burger, C.J. and White, J., dissenting); *Smith v. Goguen*, 415 U.S. at 586-587 (White, J., concurring in the judgment); *id.* at 590 (Blackmun, J., joined by Burger, C.J., dissenting); *id.* at 591-604 (Rehnquist, J., joined by Burger, C.J., dissenting); *Street v. New York*, 394 U.S. at 604-605 (Warren, C.J., dissenting); *id.*

³² For those reasons, the Flag Protection Act is not unconstitutional on its face given Congress's focus on outlawing physical destruction of the American flag—an argument raised below that neither district court had occasion to address. See 89-1433 J.S. App. 15a n.9; 89-1434 J.S. App. 2a, 15a.

Nor is the statute subject to a successful facial challenge on vagueness or overbreadth grounds. As appellees' own conduct shows, see pp. 14-17, *supra*; J.A. 46-67, 74-84, the Flag Protection Act is certainly drafted in "terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with." *United States Civil Service Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 578 (1973); see *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). And, the statute is not overbroad. Each of the acts proscribed by Congress involves conduct that poses a significant risk of physical damage to an American flag and hence a risk of tarnishing the value of that unique national symbol.

at 609-610 (Black, J., dissenting); *id.* at 615 (White, J., dissenting); *id.* at 615-617 (Fortas, J., dissenting). Informed by this Court's prior expressions, and mindful of the nature of the Texas statute, Congress sought narrowly to craft the statute so as to fit the statutory prohibition squarely within these pre-*Johnson* expressions. These expressions—and Congress's considered judgment—reflect the Court's historic sensitivity to an act of physically destroying or mutilating the flag.³³

These cases call for the Court to reconsider the *Johnson*-created assumption that flag burning is a form of expressive conduct meriting full First Amendment protection. Reconsideration of that premise is particularly appropriate where, as here, the people's elected representatives—the Congress and the President—have made the considered decision that the physical destruction of the flag is—uniquely—anathema to the Nation's values. See pp. 44-45, *infra*.

³³ Indeed, the Court's prior cases placed emphasis on the physical integrity of the flag. In *Spence v. Washington*, 418 U.S. at 406-409, 414-415, the Court spoke at length to the care with which the defendant respectfully treated the flag (in terms of its physical integrity). See note 28, *supra*. In *Street v. New York*, 394 U.S. at 577-579, 581-585, 588-594, the Court examined the record meticulously in determining that Street may well have been convicted for his utterances (as opposed to the act of flag burning itself), and thus avoided passing on the propriety of proscribing flag burning as a form of protest. And in *Smith v. Goguen*, 415 U.S. at 572-582, the Court repaired to vagueness doctrine to invalidate the conviction there, over the dissenting opinions of, among others, Justice Blackmun, who concluded that "Goguen's punishment was constitutionally permissible for harming the physical integrity of the flag by wearing it affixed to the seat of his pants," *id.* at 591.

Regardless of whether the Court regards flag burning as presenting such serious dangers, the Article III branch should, we believe, defer to the considered judgment of the elected branches on the question of how important it is to the Nation to protect the flag from physical attack and destruction. With all respect to the Court, that is a judgment that the elected branches are particularly well suited to make. Of course, the Court must decide, as is its duty, whether the Act is constitutional—but in doing so it should not, we believe, gainsay the compelling governmental interest reflected in the passage of the Act in *Johnson*'s wake.

C. Although the act of burning an American flag, in our view, falls outside the scope of protected speech under the First Amendment, a governmental prohibition against such conduct must still withstand judicial scrutiny. As both these cases, see 89-1433 J.S. App. 2a-3a; 89-1434 J.S. App. 2a, 5a & n.3; J.A. 46-67, 74-84, and *Texas v. Johnson*, 109 S. Ct. at 2536-2540, vividly show, the proscribed conduct will likely be accompanied by otherwise fully protected expression. For that reason, a governmental measure designed to outlaw destruction of an American flag must be limited to achieve that specific objective and should be scrutinized to ensure that it does not unnecessarily proscribe otherwise protected expression under the First Amendment. See, *e.g.*, *Street v. New York*, 394 U.S. 576 (1969). The Flag Protection Act, drafted by Congress to preclude a circumscribed type of conduct—physically damaging a flag of the United States—fully ensures that only such unprotected expression will be prosecuted. And on this record, appellees can advance no colorable claim that the government filed criminal charges based on any

speech or expressive conduct other than their particular flag burning activities.

III. TO THE EXTENT *TEXAS v. JOHNSON* ACCORDED FLAG BURNING FULL FIRST AMENDMENT PROTECTION, THAT DECISION SHOULD BE RECONSIDERED

We recognize that our submission here is in tension with one pivotal assumption of *Texas v. Johnson*. Nevertheless, the Court there had no occasion to address, much less weigh for constitutional purposes, the sort of *Congressional* determination regarding the need to protect the physical integrity of the American flag that led to enactment of the Flag Protection Act. For the reasons detailed above, see pp. 25-41, *supra*, neither *Texas v. Johnson* nor the First Amendment should foreclose the United States from prosecuting appellees for flag burning in violation of the new statute. However, to the extent that the Court in *Johnson* accorded flag burning, as expressive conduct, full First Amendment protection—as the courts below construed that decision, see 89-1433 J.S. App. 15a-16a; 89-1434 J.S. App. 14a-15a, and as appellees urge before this Court, see Appellees' Mem. 4-5, 12—*Texas v. Johnson* should be reconsidered and, upon reconsideration, appropriately limited.

A. We recognize that the principle of *stare decisis* serves important purposes in our legal system. It promotes the evenhanded, predictable, and consistent development of legal principles. The doctrine also fosters reliance on judicial rules, and contributes to the fact and appearance of integrity in our system of law. See, e.g., *Vasquez v. Hillery*, 474 U.S. 254, 265-266 (1986); *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 272 (1980) (plurality opinion). Those

considerations must be given due weight in this as in any other area of the law.

Nonetheless, as Justice Frankfurter explained, "*stare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience." *Helvering v. Hallock*, 309 U.S. 106, 119 (1940). Moreover, it is well established that *stare decisis* has less force in constitutional adjudication, where, short of a constitutional amendment, this Court is the only body capable of effecting a needed change. See *Monell v. Department of Social Services*, 436 U.S. 658, 696 (1978); *Glidden Co. v. Zdanok*, 370 U.S. 530, 543 (1962).

Although this Court has never adopted a "rigid formula" for determining when a prior construction of the Constitution should be overruled, *Vasquez*, 474 U.S. at 266, it has identified several factors that bear on this inquiry. One factor is whether the prior ruling is inconsistent with basic assumptions about the nature of the Constitution or established methods for giving effect to its key provisions. See *Garcia v. San Antonio Metro Trans. Auth.*, 469 U.S. 528, 547-555 (1985); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). The Court has also stated that prior decisions, even if of fairly recent vintage, should be reconsidered if they "disserve[] principles of democratic self-governance." *Garcia*, 469 U.S. at 547. Taken together, these factors strongly suggest that an underlying premise of *Texas v. Johnson*—that flag burning is subject to full First Amendment protection—should be abandoned.

B. First, the *Johnson* Court assumed that flag burning is the sort of expressive conduct fully protected by the First Amendment without having the benefit of (and an occasion to consider) the representative consensus articulated by the Congress and the President in connection with enactment of the Flag Protection Act of 1989. See *Texas v. Johnson*, 109 S. Ct. at 2538-2540, 2545-2546. And *Johnson* embraced that fundamental premise even though prior precedent did not compel that legal conclusion. To the contrary, the Court's prior decisions had by no means held that the First Amendment applied with full force to the physical destruction of the flag itself, as opposed to otherwise protected speech incident to such conduct. See *Spence v. Washington*, 418 U.S. 405, 414-415 (1974); *Smith v. Goguen*, 415 U.S. 566, 582-583 & n.32 (1974); *Street v. New York*, 394 U.S. 576, 594 (1969); notes 28 and 33, *supra*.

But through passage of the Flag Protection Act, the people's elected representatives have now made clear that the physical integrity of the flag of the United States, as the unique symbol of the Nation, merits protection not accorded other national emblems. And that representative consensus identifies the substantial potential harm posed by physical damage and mistreatment of the American flag—the assault upon and injury to the shared values that bind our national community. Upon reflection, therefore, the assumption so newly and narrowly embraced in *Johnson* should not now obliterate Congress's considered—and limited—legislative determination of the compelling need to protect the physical integrity of the American flag.

Second, according flag burning full First Amendment protection may well “disserve[] principles of

democratic self-governance.” *Garcia*, 469 U.S. at 547. Although the verbal expression associated with such activity plainly merits constitutional protection, see *Street v. New York*, *supra*, the physical conduct itself—admittedly expressive conduct—is “no essential part of any exposition of ideas, and [is] of such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed by the social interest in order and morality.” *Chaplinsky v. New Hampshire*, 315 U.S. at 572 (emphasis added). In short, the physical integrity of the unique symbol of the Nation—the flag of the United States—is an aspect of those “fundamental values necessary to the maintenance of a democratic political system.” *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. at 683. Congress has the power—consistent with the First Amendment—to safeguard that symbol from destructive “act[s] of mindless nihilism,” *Spence v. Washington*, 418 U.S. at 419. That is particularly so where, as here, Congress has left entirely in place abundant opportunities, as opposed to imposing “an absolute ban on all forms” (*Austin v. Michigan Chamber of Commerce*, slip op. 7 (emphasis in original)) of expressive conduct involving the flag, for individuals to engage in robust, wide-open, and uninhibited debate.

CONCLUSION

The judgment of the district court in *United States v. Eichman*, No. 89-1433, and the judgment of the district court in *United States v. Haggerty*, No. 89-1434, should be reversed.

Respectfully submitted.

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APRIL 1990

FILED

APR 30 1990

JOSEPH E. SPANIOLO, JR.
CLERK

In The
Supreme Court of the United States

October Term, 1989

No. 89-1433 (11)

UNITED STATES OF AMERICA, APPELLANT

v.

SHAWN D. EICHMAN, ET AL.

No. 89-1434 (10)

UNITED STATES OF AMERICA, APPELLANT

v.

MARK JOHN HAGGERTY, ET AL.

**ON APPEALS FROM THE UNITED STATES
DISTRICT COURTS FOR THE DISTRICT OF
COLUMBIA AND FOR THE WESTERN
DISTRICT OF WASHINGTON**

BRIEF FOR APPELLEE STRONG

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QUESTIONS PRESENTED

- I. Whether the First Amendment prohibits the United States from prosecuting appellees for burning a flag of the United States as a part of a political statement, in violation of 18 U.S.C. 700(a), as amended by the Flag protection Act of 1989, Pub. L. No. 101-131, §2(a), 103 Stat. 777.
- II. Whether the Flag Protection Act of 1989 is facially violative of the First Amendment to the Constitution of the United States.

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OPINION BELOW

The opinion of the Honorable Barbara Rothstein, Judge of the United States District Court for the Western District of Washington in the case of *U.S. v. Haggerty*, (89-1434 J.S. App. 1a-16a) is as yet unreported.

JURISDICTION

Appellee Strong accepts for these purposes the jurisdictional recitations presented by the United States in appellant's brief. (App. Brief, p.2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides, in relevant part: "Congress shall make no law . . . abridging the freedom of speech"

Section 700 of Title 18, United States Code, as amended effective October 28, 1989, by the Flag Protection Act of 1989, Pub. L. No. 101-131, §§ 1-3, 103 Stat. 777, provides:

(a)(1) Whoever knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon any flag of the United States shall be fined under this title or imprisoned for not more than one year or both.

(2) This subsection does not prohibit any conduct consisting of the disposal of a flag when it has become worn or soiled.

(b) As used in this section, the term "flag of the United States" means any flag of the United States, or any part thereof, made of any substance, of any size, in a form that is commonly displayed.

(c) Nothing in this section shall be construed as indicating an intent on the part of Congress to deprive any State, territory, possession, or the Commonwealth of Puerto Rico of jurisdiction over any offense over which it would have jurisdiction in the absence of this section.

(d)(1) An appeal may be taken directly to the Supreme Court of the United States from any interlocutory or final judgment, decree, or order issued by a United States district court ruling upon the constitutionality of subsection (a).

(2) The Supreme Court shall, if it has not previously ruled on the question, accept jurisdiction over the appeal and advance on the docket and expedite to the greatest extent possible.

STATEMENT

This Court held in *Texas v. Johnson*, 109 S. Ct. 2533 (1989), that application of a criminal statute of the state of Texas prohibiting desecration of venerated objects, violated the First Amendment rights of Gregory Johnson, who was criminally prosecuted for burning what that statute characterized as a "national flag". Tex. Penal Code

§ 42.09 (1989). This Court's decision in *Texas v. Johnson* is assigned by the Government as the cause for the amendment of 18 U.S.C. 700(a) (1988), into the form of what is entitled, "The Flag Protection Act of 1989," Pub. L. No. 101-131 §§ 1-3, 103 Stat. 777.¹ Salient alterations in the statute include the excision of the adjectival words "knowingly casts contempt upon . . ." which to some degree constitute a redundancy with the acts forbidden. The title of the statute was altered from the somewhat liturgical title of "Desecration of the Flag of the United States" to the more secular appellation of "The

¹ The original statute enacted in 1968 reads as follows:

Desecration of the flag of the United States; penalties

(a) Whoever knowingly casts contempt upon any flag of the United States by publicly mutilating, defacing, defiling, burning, or trampling upon it shall be fined not more than \$1,000 or imprisoned for not more than one year, or both.

(b) The term "flag of the United States" as used in this section, shall include any flag, standard, colors, ensign, or any picture or representation of either, or of any part or parts of either, made of any substance or represented on any substance, of any size evidently purporting to be either of said flag, standard, colors, or ensign of the United States of America, or a picture or a representation of either, upon which shall be shown the colors, the stars and stripes, in any number of either thereof, or of any part or parts of either, by which the average person seeing the same without deliberation may believe the same to represent the flag, standards, colors, or ensign of the United States of America.

Flag Protection Act of 1989". The former acts of desecration were retained within the body of the amended law and an additional prohibited act was added, that of maintaining the flag "on the floor or ground." The definition of what constituted "a flag of the United States" was substantially abbreviated. Acts destroying "worn or soiled" flags are exempted from criminal penalty.

Appellee Strong was a participant in a political demonstration in Seattle intended to protest the enactment of the Flag Protection Act. There appears to be no dispute that his participation in the demonstration was politically motivated and intended as a political statement. Appellant's Brief, p. 28; J.A. 80-81. In the course of the demonstration, a flag belonging to the United States Postal Service was burned. The flag was allowed to fly at night contrary to 36 U.S.C. § 174(a), establishing patriotic norms for use of the flag. J.A. 36, 37. Appellee Strong, along with others, was charged by criminal information with commission of two crimes, that of knowingly burning a flag of the United States in violation of 18 U.S.C. § 700(a) as amended by the Flag Protection Act of 1989, Publ. L. No. 101-131, § 2(a) 103 Stat. 777, and violation of 18 U.S.C. § 1361 which criminalizes destruction of government property. J.A. 34.² Relying significantly on this

² That statute provides:

Whoever willfully injures or commits any depredation against any property of the United States, or of any department or agency thereof, or any property which has been or is being manufactured or constructed for the United States, or any department or agency thereof, shall be punished as follows: . . .
18 U.S.C. Sec. 1361.

Court's opinion set forth in *Texas v. Johnson, supra*, the Honorable Barbara Rothstein held that the prosecution of appellee Strong under the Flag Protection Act of 1989 violated Strong's rights of expressive conduct protected by the First Amendment. The additional charge of destruction of governmental property was not affected by the ruling. The trial court found that the burning of the flag in question "was unquestionably expressive conduct intended to convey a political message and thus implicates the First Amendment." J.S. App. 5a. The court went on to review the government's interest in enacting such penal legislation under a standard requiring "the most exacting scrutiny". J.S. App. 6a. The court found that the predominant Governmental interest underlying the penal statute was the protection of the flag as a political symbol. J.S. App. 8a. The court found further that the interest in protecting the flag was related to the suppression of expression because that interest "can only be threatened by an act communicating a message which undermines the flag's symbolic value". J.S. App. 8a. The court indicated that "... the danger against which the government wishes to protect the flag only arises from the communicative element of the prohibited conduct." J.S. App. 8a. The court considered the various interests served by the statute as proffered by the Justice Department, the House and Senate: preservation of the value of the flag as a political symbol, preservation of the physical integrity of the flag, and vindication of the flag as an incident of sovereignty. The court determined that those interests could not justify what the court, relying upon this Court's ruling in *Johnson*, perceived as a Governmental effort to limit the use of the symbol-flag such that the permitted

uses of that symbol fostered the Government's political preferences; this message restriction, enforced by criminal sanction was found to constitute an abridgement of the freedom of speech. J.S. 15a.

SUMMARY OF ARGUMENT

I. The Flag Protection Act of 1989 is an express legislative effort to redeem the Flag Desecration act of 1968 from the kind of judicial scrutiny which the Court in *Texas v. Johnson*, 109 S.Ct. 2533 (1989) indicated it would apply to statutes or acts of this kind. The Court in *Texas v. Johnson* found that flag burning for political purposes was expressive conduct protected by the First Amendment. The Court applied a standard of "the most exacting scrutiny" to the Texas statute and the governmental interests which were asserted as justification for the suppression of speech. *Texas v. Johnson*, *supra* at 2543.

The history of flag desecration laws is of some moment to this argument. Until 1968, Congress had not enacted a flag desecration statute of national scope. It had enacted previously a flag desecration statute for the District of Columbia. By contrast, the Congress had enacted legislation which, without sanction, established a protocol or set of norms suggested as appropriate treatment and forms of respect for the flag of the United States. 36 U.S.C. § 170, *et seq.* In 1959, by Executive Order, an "official flag of the United States" was defined. Executive Order No. 10834, 24 F.R. 6865 (1959); 74 U.S.C. § 1, *et seq.* That definition included specific size requirements. Until 1968, statutes criminalizing certain forms of hostile treatment of the American flag, with the exception of federal legislation relating exclusively to the District of Columbia, were the handiwork of the state legislatures.

After this Court's ruling in *Texas v. Johnson*, the Congress sought to amend the Flag Desecration Act of 1968 so as to produce a form of legislation claimed to establish even-handed treatment towards respectful and disrespectful manipulation of the flag of the United States. The legislature enacted an act which retained former taboos against ideologically charged kinds of treatment of the flag: mutilation, defacement, and physical defilement. Additionally, a non-violent kind of forbidden act was added, that of maintaining the flag on the floor or ground. The Act's definition of a "flag of the United States" embraced a flag of any size and any substance. It did not confine its reach to flags constituting government property. Darius Strong was charged with burning a flag of the United States and in a separate charge he is claimed to have destroyed governmental property. The tandem nature of those charges tends to highlight the questions of how the charge of burning a flag of the United States substantially differs from the charge of destroying governmental property, and by what authority does the legislature seek to extend its reach to protect flags which are neither governmental property nor used on governmental property.

II. Appealing the trial court's ruling that the Flag Protection Act is unconstitutional, the Government asks the Court to recant its position expressed in *Texas v. Johnson* because a different jurisdictional voice has expressed its concern to protect the same interests addressed in *Johnson*. The Government suggests that the choral voice of Congress should have more resonance than the solitary voice of a state legislature. Fundamentally, however, the justification for the Act remains that which the

Court found deficient in *Texas v. Johnson*: the Governmental concern to protect the flag of the United States as a symbol of the nation and nationhood. Because of the Court's ruling in *Texas v. Johnson* that the flag of the United States is a symbol, rich in expressive content, and that restrictions on use of that symbol may not be used to shape public opinion, the Government advances other interests as justification for the legislation. Those interests are an interest in preserving the physical integrity of the flag of the United States in all circumstances, and preserving the flag as an incident of the nation's sovereignty. Appellee's response to the former interest is that it is integrally related to the communicative essence of the flag as symbol. The interest in preserving the flag as symbol and the interest in preserving the physical fabric of the flag cannot be segregated in any meaningful fashion. The stated interest in preserving the flag as an incident of sovereignty appears more as afterthought than interest. Review of congressional proceedings relating to the enactment of the Flag Protection Act does not evince an intensity of concern to vindicate this interest. The Act's sweep into the area of privately owned flags and use of privately owned flags on private property warrant the conclusion that this interest is not served in any narrowly tailored way. It is the appellee's position that the 1989 statute, although its appearance has changed, is intended to have the same effect as the Flag Desecration Act of 1968.

III. It is contended that the Flag Protection Act is facially overbroad in definitions of what constitutes the "flag of the United States" and in its sweep which embraces privately owned flags and treatment of flags on private property. The issue of whether the Legislature has

the power to criminalize what one does with a privately owned flag on private property is a question raised but not answered by the Court in *Spence v. Washington*, 418 U.S. 405 (1974). Absent the extension of the power to raise and support armies, a "broad and sweeping power" used to justify criminalization of the burning of draft cards in *United States v. O'Brien*, 391 U.S. 367 (1968), appellee questions what enumerated constitutional power authorizes the sweep of the Act.

The Act's definition of "flag of the United States" suffers from excess and overbreadth. The Act imposes no limit on size or on substance of a protected flag. Although the President has established an official flag of the United States with specific size requirements, that definition appears to have been ignored. The absence of size and substance definitions suggests that one could be prosecuted for private mistreatment of a miniature flag, the kind of flag which is neither supportive of the claimed interests of protection of the physical integrity of the flag or protection of the incidents of sovereignty. The broad definition of the flag of the United States, and consequent lack of fixed identity, suggests a fungibility of subject matter which seems to work at cross purposes with those interests claimed to justify the criminal legislation. Destruction or defacement of a flag, other than one having particular historical significance, does not threaten the available supply of "flags of the United States." This fungibility of the definitional flag renders the Act substantially different from the kind of act which would prohibit defacement of the Washington Monument, a unique and non-fungible structure. It is suggested that the overbreadth in the flag's definition and the projected reach of the statute are consequences of the Legislature's

concern to establish the appearance of content-neutrality of the Act which in turn supports its contention that the only purpose of the Act is to protect the "physical integrity of the flag in all circumstances."

IV. It is appellee's claim that the Flag Protection Act is not narrowly tailored to serve compelling, or substantial governmental interests. The Act is justified by reference to its subject matter, preservation of the flag as symbol, which in turn is communicative in essence. Because the Act prohibits the communicating of certain messages through manipulation of the flag-symbol, the Act relates to the content of expression and inhibits or restricts that content. Partisan emphasis on whether or not the Act is content-neutral derives from concern to invoke differing degrees of judicial scrutiny toward the Act. If an act is content-neutral, it may be argued that the Court should be more favorably disposed toward legislative preferences in enacting the legislation.

V. As the Court in *Texas v. Johnson* makes clear, politically-expressive conduct is protected by the First Amendment. Flag-burning as a dramatic form of political expression does not occupy the same judicially disfavored status as obscenity or defamation.

ARGUMENT

I. The First Amendment's protection of political expression prohibits the United States from criminally prosecuting appellees for knowingly burning flags of the United States in violation of the Flag Protection Act of 1989.

As the amicus brief of the United States Senate makes clear, Congress has for many years considered legislation

criminalizing various kinds of treatment of the flag. Senate Brief pp. 6-18. Between 1794, when Congress established the flag as a national emblem, and 1968, when national penal legislation was enacted with regard to the "flag," Congress had enacted what this Court has described as "precatory regulations" defining what should be appropriate civic treatment of the flag. *Texas v. Johnson*, *supra* at 2547; 36 U.S.C. § 173, *et seq.* These laws were designed, without sanction, to establish a protocol for citizens in their treatment of what was defined as an "official flag." Executive Order 10834, 24 F.R. 6865 § 31 (1959). These laws acknowledged burning as an appropriately "dignified" way of disposing of a flag which "is no longer a fitting emblem for display." 36 U.S.C. § 176(k).

The impetus for enactment of criminal sanctions for mistreatment of the flag appears to lie within the turmoil generated by the Vietnam war. *See generally*, John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 Harvard Law Review, pg. 1482 *et seq.* (1975). Prior to the time, legislation criminalizing mistreatment of the flag was to be found in state's statutes. *See also*, Rosenblatt, *Flag Desecration Statutes: History and Analysis*, 1972 Washington U.L.Q. 193. In 1917, Congress did enact a statute similar to the state desecration statutes which punished contemptuous treatment of the flag within the District of Columbia. 4 U.S.C. § 3 (1971). The state criminal statutes are described as focusing on two kinds of offensive activity: acts of "desecration," taking the legislative model which provides that "(n)o person shall publicly mutilate, deface, defile, defy, trample upon, or by word or act cast

contempt upon any such flag"; and acts of "improper use," which criminalized the superimposition of marks or objects upon a flag which was publicly displayed. *Ely, supra*, at 1502, 1503. The desecrating acts have been described as "ideologically charged acts" imbued "with a particular set of ideologically charged outlooks." *Ely, supra* at 1503. Both the enactment of 18 U.S.C. § 700, and its trimmed version, the Flag Protection Act of 1989, fall generally within the first described category. The language of this model which described acts of "contempt" toward the flag have been determined to be violative of the Constitution on vagueness grounds. *Smith v. Goguen*, 415 U.S. 566 (1974). Also condemned by this Court on First Amendment grounds were statutory prohibitions against use of contemptuous words with regard to the flag. *Street v. New York*, 394 U.S. 576 (1969).

In 1989, this Court ruled that the burning of a United States flag by Gregory Johnson constituted expressive conduct protected by the First Amendment of the Constitution of the United States; the Court found that application of the Texas penal statute criminalizing the "desecration of a venerated object," to Johnson's political act of burning an American flag constituted a violation of Johnson's First Amendment rights. It is undisputed, and indeed, emphasized by all parties, that the Flag Protection Act of 1989, and the ensuing criminal prosecution of appellee Darius Strong, derive from the Court's ruling in the *Johnson* case.

With apologies to the Court for perhaps excessive reference to a recent and much discussed ruling, it is suggested that reiteration of certain aspects of the ruling may be helpful to Strong's argument. The Texas penal

code provision is set forth below.³ This Court quoted with apparent approval the Texas Court of Criminal Appeals which reversed Johnson's conviction:

Recognizing that the right to differ is the centerpiece of our first amendment freedoms . . . a government cannot mandate by fiat a feeling of unity in its citizens. Therefore that very same government cannot carve out a symbol of unity and proscribe a set of approved messages to be associated with that symbol when it cannot mandate the status or feeling the symbol purports to represent.

Texas v. Johnson, supra p. 2537, citing *Texas v. Johnson*, 755 S.W.2d 92, 97 (Tex. 1988). This Court noted also the appellate court's reliance on this court's decision in *West Virginia Board of Education v. Barnett*, 319 U.S. 624 (1943) suggesting that for that kind of penal statute to be applied to disruptive acts of burning the flag, there must be evidence that the flag was "in grave or immediate danger of being stripped of its symbolic value". *Texas v. Johnson, supra* at 2537 citing *Barnett, supra* at 639. Appellee Strong suggests that this same standard should govern analysis of all governmental interests herein.

³ Desecration of Venerated Object

(a) A person commits an offense if he intentionally or knowingly desecrates:

- (1) a public monument;
- (2) a place of worship or burial; or
- (3) a state or national flag.

(b) For purposes of this section 'desecrate' means deface, damage, or otherwise physically mistreat in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action.

(c) An offense under this section is a Class A misdemeanor. Tex. Penal Code Ann. § 42.09 (1989).

The Court in *Johnson* pursued a course of analysis which may be repeated in the present context. The Court first made a determination that the burning of the flag constituted expressive conduct, thereby allowing Johnson to assert the protections of the First Amendment in seeking to overturn his conviction. *Texas v. Johnson*, 2538-2540. The Court looked to the speaker's or actor's intent in attempting to assess whether given conduct involved protected expression. The question posed was whether "[a]n intent to convey a particularized message was present and (whether) the likelihood was great that the message would be understood by those who viewed it". *Texas v. Johnson, supra* at 2539, citing *Spence v. Washington*, 418 U.S. 405, 410, 411 (1974). In this connection the Court acknowledged the symbolic essence which gives meaning to a national flag:

That we have had little difficulty identifying an expressive element in conduct relating to the flag should not be surprising. The very purpose of a national flag is to serve as a symbol of our country; it is, one might say, 'the one visible manifestation of two hundred years of nationhood'.

Texas v. Johnson, at 2539 citing *Smith v. Goguen*, 415 U.S. 566, 603 (Rehnquist, J. dissenting). The Court went on to observe, "Pregnant with expressive content the flag as readily signifies this Nation as does the combination of letters found in 'America' ". *Texas v. Johnson, supra* at 2540.

The Court thereafter assessed what the Government asserted as those interests sought to be protected by the Act criminalizing expressive conduct. The Court found that the paramount governmental interest lay in "preserving the flag is a symbol of nationhood and national

unity." *Texas v. Johnson, supra* at 2541. Considering a proposed alternative interest, that of avoiding breaches of the peace, the Court found no evidence warranting such threat by the described activity and went on to observe that Texas had a disorderly conduct statute which appeared to provide a sufficient less restrictive alternative for purposes of punishing flag burning in order to keep the peace. *Texas v. Johnson, supra* at 2542, citing *Boos v. Barry*, 485 U.S. 327 (1988).

The Court held that the Government's interest in preserving the flag as a symbol of nationhood and national unity constituted an interest which was directly "related to the suppression of expression". *Texas v. Johnson, supra* at 2543. The Court found that concerns for preserving expressions or symbols of nationhood and national unity only "blossom" when treatment of the flag communicates some message; therefore the concern to preserve the flag as a symbol of national unity through penal legislation relates "to the suppression of free expression, thereby taking treatment of the weighing of the Governmental interest outside the realm of the test set forth by the Court in *U.S. v. O'Brien*, 391 U.S. 367 (1968). *Johnson, supra* at 2542.

In *Johnson* the Court found that a criminal conviction for flag burning under Texas law depended on the likely communicated impact of his expressive conduct. *Johnson* at 2543. The Court therefore found that the penal restriction on political expression was "content-based." *Texas v. Johnson, supra* at 2543. In pursuing this analysis, the Court reviewed the statute to determine whether or not it was "aimed at protecting onlookers from being offended by the ideas expressed by the prohibited activity." *Johnson,*

supra at 2543 n.7. This being the case with the Texas statute, the Court reviewed the Government's asserted interest with "the most exacting scrutiny". *Johnson, supra* at 2544. The Court found that the Government was seeking to "foster its own view of the flag by prohibiting expressive conduct relating to it". *Johnson* 2545.

Finally, the Court returned to the concern expressed in the beginning of its opinion, apprehension that the Government should be permitted to give privileged status to a symbol and then restrict public manipulation of the symbol, a symbol having cognitive and emotive impact upon virtually all American citizens, such that that symbol might communicate only a "limited set of messages". *Johnson, supra*, at 2540. The Court acknowledged that "to do so, we would be forced to consult our own political preferences and impose them on the citizenry, in the very way that the First Amendment forbids us to do." *Johnson, supra* at 2546. To the extent that there may exist a hierarchy of values in expression the Court appeared to emphasize the priority accorded political expression, political expression which was fundamental to *Johnson's* conduct and to that of appellee Strong. " . . . He was prosecuted for his expression of dissatisfaction with the policies of this country, expression situated at the core of our First Amendment values." *Texas v. Johnson, supra* 2543.

II. The justifications by the Government for intrusion upon politically expressive conduct do not survive First Amendment scrutiny.

The Government's response to *Texas v. Johnson* is to claim that the penal statute of 1989 constitutes a new

juridical arena for a new balancing of governmental interests and personal freedoms. Appellant claims that the fact that Congress, as opposed to a state legislature, has asserted certain interests in preventing mistreatment of the flag, should alter the manner of the Court's review; it claims that the statute is content-neutral and therefore is subject to a more relaxed standard of review; and it claims that the purpose of the statute has nothing to do with expression but rather is an effort to preserve "the physical integrity of the flag in all circumstances". Amicus Brief Senator Biden p. 7. Additionally, the House of Representatives asserts that the Flag Protection Act of 1989 is an effort to preserve or protect the flag as an incident of our nation's sovereignty. Appellee Strong agrees that these interests have substance; he does not agree that his First Amendment rights to political expression should be criminally subordinated to those interests.

It is not the lesson of history that this Court is obligated to adopt Congress' view of the constitutionality of its own statutes. As indicated by Chief Justice Marshall,

It is, emphatically, the province and duty of the judicial department, to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each . . . If, then, the courts are to regard the constitution, and the constitution is superior to any ordinary act of the legislature, the constitution, and not such ordinary act, must govern the case to which they both apply.

Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177-178 (1803). Further,

Those, then, who controvert the principle, that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity maintaining the courts must close their eyes on the constitution and see only the law. This doctrine . . . would declare that if the legislature shall do what is expressly forbidden, such Act, notwithstanding the expressed prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits.

Marbury, supra at 177-178.

The principal of judicial deference to the legislature espoused by the Government should be tempered by the Court's concern that criminal statutes should be reviewed with particular scrutiny: *Houston v. Hill*, 482 U.S. 451, 459 (1986). Assuming that the Court may find that the statute does implicate First Amendment rights of expressive conduct, the Court may be reminded of its observation that "deference to a legislative finding cannot limit judicial inquiry where First Amendment rights are at stake". *Sable Communications of California, Inc. v. FCC*, ___ U.S. ___, 109 S. Ct. 2829 (1989), quoting *Landmark Communications, Inc. v. Virginia*, 485 U.S. 829, 843 (1975). Just as the Court has declined historically to substitute a congressional determination of the constitutionality of a statute for its own determination, so also the Court has resisted the temptation to intrude into the legislative sphere, insisting upon its lack of authority to rewrite an unconstitutional statute in order to bring that statute into conformity with the dictates of the Constitution. *Virginia v. American Bookseller Assn.*, 484 U.S. 383 (1988).

Although it may be argued that this Court should not strain to discern covert or obscure motivations underlying congressional action, it is suggested that where the purposes are reasonably clear, the Court is not required to avert its gaze. This Court has indicated, "In every case where legislative abridgement of (First Amendment) rights is asserted, the Court should be astute to examine the challenged legislation in question." *Schneider v. State*, 308 U.S. 147, 161 (1939). In another First Amendment context, the Court has recognized its obligation to consider whether or not a given legislative enactment constitutes an establishment of religion in violation of the First Amendment. That endeavor consists of a two-prong test,

The purpose prong of the Lemon test asks whether the government's actual purpose is to endorse or disapprove of religion. The effect prong asks whether irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval. An affirmative answer to either question should render the challenged practice invalid.

Lynch v. Donnelly, 465 U.S. 668 at 690 (1984) (O'Connor, J. concurring).

Regardless of whether or not a meaningful distinction attends the particular legislative voice which recites the interests underlying the flag protection legislation, the interests herein expressed by Congress and the Government with regard to the Flag Protection Act of 1989, do not appear to differ fundamentally from the governmental interest addressed by the court in *Texas v. Johnson*. The Government has expressed an interest in preserving the symbolic value of the United States' flag as "The

unique symbol of the nation." Appellant's Brief, p. 34. The Court in *Johnson* found that the pursuit of that interest could not justify the criminalizing of the expressive political conduct of Mr. Johnson.

An alternative interest is proffered by the Appellant, that of "preserving the physical integrity of the flag in all circumstances." Amicus Brief, Senator Biden, P. 28. The Court in *Johnson* had suggested that a flag mutilation statute "aimed at protecting the physical integrity of the flag in all circumstances" might pass constitutional muster. *Texas v. Johnson*, *supra* at 2543; *Smith v. Goguen*, *supra* at 1255-1256 (Blackmun, J. dissenting.) The Flag Protection Act of 1989 does not protect the physical integrity of the flag in all circumstances. The description of some of the forbidden acts, mutilation, defacement, physical defilement, are destructive although ideologically freighted acts. The forbidden act of maintaining the flag on the floor or ground does not impair immediately the physical integrity of the flag. Evidence of that activity's origin suggests congressional disfavor of artistically hostile views of the flag and not with physical integrity. 135 Cong. Reg. 52811 (daily ed. March 16, 1989). One may argue that the definition of flag of the United States, which appears to condone miniaturization of the flag and recognizes flags of "any substance," does not evidence concern for the physical integrity of the flag. The statute does not address the issue of whether the flag may be flown in inclement weather which would certainly impair the physical integrity of the flag. The very exemption for worn and soiled flags, by decriminalizing disposal of flags too much touched by history suggests that the interest in the physical integrity of the flag is situational only.

Indeed, the "worn and soiled" flags are probably those most deserving of protection. The Court has noted an open question whether sewing an unofficial flag to a piece of clothing is an assault upon the physical integrity of the flag. *Smith v. Goguen*, *supra* at 570 n. 4.

The public nature of the present controversy should not be wholly ignored by the Court in its efforts to assess the purpose and effect of the Act: "Its prohibitory and regulatory effect and purpose are palpable. All others can see and understand this. How can we properly shut our mind to it?" *Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 37 (1922), referring to the Child Labor Tax Law. It is difficult to understand what the integrity interest means without relating this interest to the other expressed interest, that of preserving the flag as a symbol of the nation and nationhood. The interest in preserving the physical integrity of the flag would seem to serve the primary interests of securing the visible and the symbolic value of the flag. The two interests are not discrete.

The House of Representatives asserts an interest which may derive from the dissent of Chief Justice Rehnquist in *Texas v. Johnson*. That interest is the interest in preserving the flag as an incident of sovereignty. It may at least be the subject of comment that this perceived governmental interest is of recent vintage in the flag mistreatment context. It derives largely from concerns residing in an international rather than an intranational context. The trial court found a notable absence of reliance upon this interest in the congressional hearings. J.A. 12a, 13a. In light of the Government's insistence that the Act's reach extends to privately owned flags in private homes, one is hard-pressed to understand how that

kind of expansive statute may be perceived to have been tailored narrowly to serve apprehension of injury to apertenances of the sovereign.

In assessing the significance of interests advanced to justify the statute, the Court is reminded of a statement in the Senate's brief: "It is of course a matter of fair debate whether legislation to protect the flag is needed." Brief of United States Senate, p. 3.

III. THE FLAG PROTECTION ACT IS FACIALLY OVERBROAD IN ITS DEFINITION OF "FLAG OF THE UNITED STATES" AND IN ITS PROJECTED REACH INTO PRIVATE HANDS ON PRIVATE PROPERTY.

It would seem that a significant characteristic of what Congress has defined as a "flag of the United States" is the fungibility and polymorphism of the res, or flag. The definition adopted by Congress suggests application of the penal sanction of the Act to mistreatment of a "flag" capable of reproduction and replication to an extent limited only by the will of the manufacturer. Although the pattern is immutable, the fabric, "any substance," can be duplicated or replaced at will. This fungibility distinguishes a flag of the United States from the Lincoln Memorial or any particular flag used in the course of war or ceremony in our nation's history.

There is also no definitional limitation within the statute upon the size of a protectable flag. The protected flag may bear its official size as set forth in Executive Order 10834 (Sec. 4, U.S.C. *et seq.*), or it may be a desk-top flag or the kind of flag that children affix to their bicycles. The Court has noted concerns of definition regarding the "flag." *Smith v. Goguen, supra* at 579 n. 24.

A protected flag need not be governmental property, as urged by the Government. Appellant's Brief, pp. 29, 30, n. 24. The Government is urging upon the Court an interpretation of the statute which criminalizes the maintaining of a privately purchased flag upon the floor or ground of private premises. Under the cloud of this Act, one cannot be interred with a flag of the United States without concern by the bereaved that this will be the subject of prosecution.

The concept of facial overbreadth is not a concept which this Court is quick to apply. *Massachusetts v. Oakes*, ___ U.S. ___, 109 S. Ct. 2633 (1989). As the Court has noted, "We have addressed overbreadth only where its affect may be salutary." *Massachusetts v. Oakes, supra* at 2637. The Court has indicated that "overbreadth is a judicially created doctrine designed to prevent the chilling of protective expression." *Massachusetts v. Oakes, supra* at 2638. The concept is a vehicle for allowing one whose conduct could constitutionally be prescribed by a statute to assert the rights of others not before the Court whose constitutional rights are infringed by an overbroad statute. *Broadrick v. Oklahoma*, 413 U.S. 601 (1973).

The concept of facial overbreadth is distinct from the generally accepted proposition that regulations affecting expressive conduct must be "narrowly tailored to serve an important or substantial state interest". *Clark v. Community for Creative Non-violence*, 468 U.S. 288 at 298 (1984). However, the latter term has been employed in overbreadth analysis. *Houston v. Hill*, 482 U.S. 451, 465 (1986). This latter concept, applicable to challenges to the constitutionality of a statute as applied to the complaining

party, is part of a test which parallels the test adopted by the Court in *United States v. O'Brien*, 391 U.S. 367 (1968). As discussed below, the position of the Government in this case and the position of the Court in *Texas v. Johnson* is that the *O'Brien* test, providing a more legislative-favoring review of the impact of a statute upon First Amendment freedoms does not apply to flag burning as a target of the Flag Protection Act of 1989. The brief of Senator Biden argues against the Government on this point. Brief of Senator Biden, p. 9.

Utilization of the overbreadth doctrine to strike down a piece of legislation, requires a showing that the statute is "substantially overbroad, judged in relation to the statute's plainly legitimate sweep." *Broadrick, supra* at 615. The definition of what is "substantial" is not empirically precise. For these purposes, however, it is respectfully suggested that the statutory definition of "flag of the United States," extending as it does to privately purchased flags of no particular size or substance when used by individuals on private property, evidences the Act's excessive reach into protected areas of expression. This over-reaching is a logical consequence of a legislative effort to achieve "content neutrality" in the Act. This Court in *Spence v. Washington* expressed doubts about the authority of government to extend "improper use" statutes to privately owned flags on private property. *Spence v. Washington*, 418 U.S. 405, 408, 409 (1974).

Since at least 1959, Congress has designated an "official" form for the "flag of the United States". 4 U.S.C. § 1, *et seq.* Executive Order No. 10834 established authorized sizes of the flag of the United States for executive agencies; that flag constitutes "the official flag of the United

States". Executive Order No. 10834, 24 F.R. 6865 (1959). The Flag Protection Act of 1989 makes no reference to that official flag but rather refers generically and unrestrictedly to the flag of the United States. The Act extends to flags of unofficial size, presumably even miniature flags, flags of diminished physical integrity and unserviceable to the sovereign. The Act's expansive, definition of the "flag of the United States" corroborates the hypothesis that the statute serves predominately the Government's interest in preserving the flag as the symbol of the nation in all decedent circumstances. Expansive language of a penal statute which permits selective prosecution may offend the Constitution additionally on ground of vagueness and lack of due process. *Smith v. Goguen*, 415 U.S. 566, 573-575 (1974).

The Government asserts that Congress in the Flag Protection Act attempted to "protect the physical integrity of the flag under all circumstances". U.S. Brief, p. 28. This interest received heightened attention after the Court in *Texas v. Johnson* suggested that such a statute might survive judicial scrutiny. *Texas v. Johnson, supra* at 2543. The plenary assertion of the government's power over private flags seems to have been perceived as necessary to establish a content neutral statute. The tension between the need to establish a content neutral statute and the consequence of overreaching into areas where Government need not and should not tread become apparent. Because the statute applies to flags large or small, flags of any substance, flags in the home and flags privately purchased for private use, it is respectfully suggested, that the statute is facially overbroad.

IV. THE FLAG PROTECTION ACT OF 1989 IS NOT THE LEAST RESTRICTIVE MEANS OF PRESERVING A LEGITIMATE GOVERNMENT INTEREST NOR IS IT CONTENT-NEUTRAL.

It is not this author's wish to smirch the richness and intensity of the emotional and intellectual impact of the American flag upon the people of this nation. However, one may still question whether or not the Government has a right to criminalize ideologically charged mistreatment of privately-owned flags on non-governmental property. It may be argued that only in the facial overbreadth context can Darius Strong, who is claimed to have destroyed governmental property, be permitted to raise questions regarding overextension of the Flag Protection Act into areas wherein individual citizens and not the Government should have hegemony. Nonetheless, appellee Strong would argue that the Flag Protection Act is not fashioned in a manner which provides the least intrusive means of serving what the Government claims to be a substantial, or compelling, Governmental interest. The least intrusive means would confine its reach to destruction of governmental property. Whether or not this less-restrictive-alternative kind of analysis would apply to expressive conduct in this context may be questioned. Cf. *Ward v. Rock Against Racism*, 109 S. Ct. 2746 (1989), holding that the least intrusive means test does not apply to legislation which implicates First Amendment rights but which is not content-based. The Court in that case found that sound amplification guidelines conditioning use of an amphitheater constituted a regulation of the "time, place or manner of protected speech" which must be "narrowly tailored" to serve the Government's legitimate

content-neutral interests, but need not be the "least restrictive or least intrusive means of doing so." *Ward, supra*, pp. 2757-58. However, in that case the Court noted that the Government may not regulate expression in such a manner that "a substantial portion of the burden on speech does not serve to advance the Government's goals". *Ward, supra* at 2758. The Court indicates also that "if strict scrutiny," or "the most exacting scrutiny" is to be applied to the regulation, then the Court will inquire as to whether there are alternatives to the particular legislations which are less restrictive with regard to protective speech. In this case, it is respectfully suggested that the other criminal charge against appellee Strong, that of destroying governmental property, a post office flag, provides suitably restricted reach for the Government in its efforts to protect official Government-owned flags from acts of injury or destruction. Beyond the reach of that statute lies an ill-defined region where the Government seeks to assert a dignitary interest in shaping the attitudes of the governed toward the Government.

Arguments addressed to content neutrality are arguments attempting to trigger particularized degrees of judicial intensity in reviewing the intrusion of the Act upon First Amendment protections. It may be argued that if the statute is content-neutral, then the standard of "exacting scrutiny" of the purpose and effect of the statute should not be assayed by this Court. The Government claims that the Flag Protection Act is content neutral because it has excised any reference to acts or words of contempt which historically were considered correlative to mutilation or defacement or desecration of the flag. 18 U.S.C. § 700(a)(1968). Legislative history, public discussion, and

the statutory words themselves, indicate that the excised words are immanent in the Act.

In 1968 the Desecration Act criminalized casting contempt on the flag by mutilating or burning it. Flag mutilation was a contemptuous act. Appellee Strong contends that excision of the predicated words does not in any way signal that the statute was intended to have a different meaning in 1989 than it did in 1968. It is abundantly apparent by the Government's own presentation herein, that the purpose in the legislative surgery was not to produce a different kind of penal focus, but rather to produce a facially permissible statute, bearing the patina of even-handedness. Congress' choice of the wording of the statute does not prohibit the Court from "conducting an independent determination of a statute's constitutionality based upon its actual effect." *Meese v. Keene*, 481 U.S. 465, 488 (1987) (Blackmun, J. dissenting). As indicated by the Court on another occasion; "The fact that the statute's practical effect may be to discourage protected speech is sufficient to characterize (it) as an infringement upon first amendment activities. *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 255 (1986).

A statute is content neutral if its restrictions on First Amendment freedoms are those which "are justified without reference to the content of the regulated speech." *Boos, supra* at 320 citing *Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976). The Trial Court in *Haggerty* found that the Flag Protection Act is not content neutral. J.S. App. pp. 9a-10a. The Court found that the Government's justifications for its statute, protecting the flag as a political symbol, related to the content of the regulated speech. The Court found that the

justification for the statute was an effort to produce a non-hostile or favorable public attitude towards the flag and, by extension, toward the nation which it symbolized. The justification, then, constituted a proscription on what messages could be communicated by use of the flag, an object which the Government had singled out as a form of speech. It is suggested that the very singling out of the flag as a "unique symbol" and as a symbol which cannot be defaced and mutilated or maintained upon the ground of itself establishes a content-base. By singling out the flag as a symbol the Government has suffused it with public meaning and impact. The flag has been created as a form of speech which cannot constitutionally be shaped to suit the Government's ends.

Were the Court to find that the statute is content-neutral it may be argued that the statute conforms to judicial standards governing restrictions on the time, place or manner of protected speech, standards which require that those restrictions "are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." *Clark v. Community for Creative Non-violence*, 468 U.S. 288, 293 (1984). This standard may apply if the Court found that the statute in question was a time, place or manner type of regulation. Appellee Strong contends that this act does not constitute such a mildly intrusive regulation, as it forbids integrally and absolutely, certain modes of communicating certain political messages about the Government. It limits the use of the flag to production of preferred messages.

The *Clark* test parallels a test which inquires whether there may be a sufficiently important governmental interest in regulating a non-speech element, therein the burning of a draft card, such as will justify "incidental limitations on First Amendment freedoms." *U.S. v. O'Brien*, 391 U.S. 367, 378 (1968). The *O'Brien* test would countenance such "incidental limitations" when the governmental interest "... furthers an important or substantial governmental interest; if the interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged first Amendment freedoms is no greater than is essential to the furtherance of that interest." *O'Brien*, *supra* at 377. The Court in *Johnson* found that the *O'Brien* test did not apply where the governmental interest in the flag's symbolic value was related to the suppression of free expression. *Texas v. Johnson*, *supra* at 2542.

The *O'Brien* test was applied when the parties agreed that the draft card mutilation statute was "content-neutral." *O'Brien*, *supra* at 375. The draft card law enacted pursuant to Congress' "broad and sweeping" power to raise and support armies was found to have substantial utility to the government's record keeping processes. The flag has by contrast no apparent utility extrinsic to, and independent of, its obvious symbolic and communicative value.

V. Dramatic political expression has social value.

An additional argument of the Government concedes that the Act forbids expression, but posits that the forbidden kind of expression is of so little social value that the

expression doesn't merit constitutional protection. These kinds of outcast expression include obscenity, fighting words and defamation. This argument was rejected by the Court in *Texas v. Johnson* when it found that flag burning with political intent constituted expressive conduct which was permitted and protected by the First Amendment. *Texas v. Johnson*, *supra* at 2542. None of the examples cited by the Government, obscenity, defamation, fighting words, reflect any relationship to political expression which has been found by this Court to "lie at the core of our first amendment values." *Texas v. Johnson*, *supra* at 2543; *Boos v. Barry*, *supra* at 318. In this context it might be noted that not only was the purpose of Darius Strong's participation in the demonstration which produced a burned flag political, but it represented a dialogue, albeit an impassioned one, between an individual and the authority of government. As his declaration makes clear, his protest was a criticism not of the people of the United States of America and the texture of their history, but rather of what he considered to be the excesses of Government in suppressing the freedom of individuals. The Flag Protection Act of 1989 radiates with concern that certain attitudes hostile to the Government should not be communicated toward a flag of the United States, which is described in generic and fungible form. Mr. Strong's involvement in a demonstration where a U.S. Postal Office flag was burned, constituted his effort to dramatize his rights of expression against the Government's efforts to limit them. Although we may not rush to applaud the act of burning a flag of the United States, it is respectfully suggested that neither should we be quick to

countenance imprisonment for one who performs this act to dramatize his political views.

In analogous circumstances this Court has observed: "We cannot sanction the view that the Constitution, while solicitous of the cognitive component of individual speech, has little or no regard for that emotive function, which practically speaking, may often be the more important element of the overall message sought to be communicated." *Cohen v. California*, 403 U.S. 15, 26 (1971). The wearing of the statement "Fuck the Draft" on a jacket is both a statement and an act, producing offensive communication. *Cohen, supra*. Just as Massachusetts appears to have weathered the assault upon its sensibilities posed by the youthfully defiant expression on Mr. Cohen's jacket, it is respectfully suggested that this nation and its flags, official and unofficial, will survive in good health the constitutionally tolerated acts of flag burning as political statement.

CONCLUSION

The judgment of the District Court in *United States v. Haggerty*, No. 89-1434, should be affirmed.

Respectfully submitted,

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In The
Supreme Court of the United States
October Term, 1989

UNITED STATES OF AMERICA, APPELLANT
v.

SHAWN D. EICHMAN, ET AL.

UNITED STATES OF AMERICA, APPELLANT
v.

MARK JOHN HAGGERTY, ET AL.

On Appeals From The United States
District Courts For The District Of Columbia
And The Western District Of Washington

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QUESTIONS PRESENTED

1. Whether the Flag Protection Act of 1989, as applied to the expressive burning of a flag in an overtly political demonstration, violates the First Amendment to the United States Constitution.

2. Whether the Flag Protection Act of 1989 on its face violates the First Amendment to the United States Constitution.

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In The
Supreme Court of the United States
October Term, 1989

No. 89-1433

UNITED STATES OF AMERICA, APPELLANT

v.

SHAWN D. EICHMAN, ET AL.

No. 89-1434

UNITED STATES OF AMERICA, APPELLANT

v.

MARK JOHN HAGGERTY, ET AL.

On Appeals From The United States
District Courts For The District Of Columbia
And The Western District Of Washington

BRIEF FOR APPELLEES

STATEMENT OF THE CASE

Introduction

The United States seeks to do in these cases precisely what this Court barred the State of Texas from doing in *Texas v. Johnson*, 109 S. Ct. 2533, 2547 (1989): "criminally

punish a person for burning a flag as a means of political protest." The criminal statute invoked is worded differently, but the governing legal principle is the same: the government may persuade and encourage people to respect the flag, but it may not compel the appearance of respect by penalizing flagburning. *Id.*

The lesson of *Johnson* is so clear that before these cases the United States conceded the point. The Administration testified in Congress that "[i]n the face of the Court's holdings in *Texas v. Johnson* and *Spence v. Washington*, and especially given the sweeping reasoning in those cases, it cannot be seriously maintained that a statute aimed at protecting the Flag would be constitutional."¹ To permit the government to incarcerate individuals merely for expressing opposition to its most political symbol would have grave consequences for the meaning of freedom of expression. This Court should reaffirm the principles articulated so recently in *Johnson*, and affirm the district courts' judgments.

Statement of Facts

A. The Demonstrations

These consolidated appeals arise out of similar political demonstrations in Washington, D.C., and Seattle,

¹ *Statutory and Constitutional Responses to the Supreme Court Decision in Texas v. Johnson: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 101st Cong., 1st Sess. 183 (1989) ("House Hearings") (Written Testimony of Assistant Attorney General William Barr, Office of Legal Counsel).*

Washington. Both cases were resolved on motions to dismiss on the basis of undisputed facts.

1. *United States v. Eichman*

On October 30, 1989, defendants in *Eichman*, together with Gregory Johnson, the defendant in *Texas v. Johnson*, burned United States flags on the steps of the United States Capitol as part of a political demonstration. Defendants arrived at the Capitol with a large contingent of news media, and circulated a written statement signed by all four flagburners. J.A. 43-45. The circulated statement explained that the flagburning was undertaken to protest a broad array of United States policies, and to oppose the Act's "compulsory patriotism" in light of such policies. J.A. 55-57.²

Defendants subsequently submitted declarations further explaining their intent in burning the flags. David Blalock, a veteran of the Vietnam War, explains that his service in Vietnam led him to associate the flag with United States intervention abroad, and that he burned the flag in opposition to such intervention. J.A. 50-54. Shawn Eichman, a New York artist, burned the flag to protest the United States' oppression of women and exploitation abroad. J.A. 46-49. Scott Tyler, a.k.a. "Dread Scott," a Chicago-based "revolutionary artist," burned the flag in

² The police arrested the three defendants and Mr. Johnson, and initially charged all four with disorderly conduct, demonstrating without a permit, and violating the Flag Protection Act of 1989. J.A. 43. The United States Attorney ultimately decided, however, to file informations only under the Flag Protection Act, and decided not to charge Mr. Johnson. J.A. 68.

part to protest the United States' oppression of Black people, and in part as a response to reactions to his art exhibit, "What is the Proper Way to Display a U.S. Flag?" J.A. 58-67. Mr. Tyler's art exhibit caused a political uproar when it was displayed at the School of the Art Institute of Chicago in February 1989, *id.*, and eventually caused Congress to add the clause in the current Act criminalizing "maintain[ing the flag] on the floor or ground." See *infra* note 37. The fourth flagburner, Gregory Johnson, burned the flag "to express unity with . . . oppressed people throughout the world." J.A. 68-71. These statements underscore that defendants burned flags out of deeply-held convictions founded upon their personal experiences.

Defendants consider flagburning an essential element of their political expression, because for them, the flag represents not glory but oppression. Mr. Blalock, for example, states that "burning the Flag is a vital and indispensable means by which to communicate [his] message," because it is "a dramatic and total rejection of forced patriotism and the corruption that it conceals," and is "clearly understood by all the world's people." J.A. 53.

2. *United States v. Haggerty*

Early on the morning of October 28, 1989, minutes after the Flag Protection Act of 1989 took effect, defendants in *Haggerty* burned United States flags in a political demonstration in front of a Post Office in downtown Seattle. J.A. 74-84. A leaflet circulated in connection with the demonstration argued that "[b]lind patriotism must

not be the law of the land," that "[b]urning a flag is more of a symbol of freedom than the flag itself," and that the Flag Protection Act was "an attack on political protest and dissent." J.A. 79. The government accused defendants in *Haggerty* of burning a flag owned by the United States Postal Service. J.A. 35.

As in *Eichman*, defendants in *Haggerty* submitted declarations further explaining their intent in burning flags. Carlos Garza, a Mexican-American, burned flags "to express [his] outrage over the mistreatment of Hispanic Americans by our government." J.A. 83. Jennifer Campbell, a student at the University of Washington, did so "to strip off this blindfold of unquestioning allegiance and to cause people to focus on the suffering of people, both at home and abroad, and to thereby move America closer towards everything it is supposed to be." J.A. 77. Mark Haggerty participated because "[t]he U.S. flag stands not for the people of the U.S. but for the power of the super-rich ruling class as expressed through their government." J.A. 75. And Darius Strong sought to "communicat[e] the idea that a person's freedom to express an opinion critical of the Government is of greater legal and moral value in America than the Government's authority to criminalize acts constituting demonstrations of . . . individual beliefs." J.A. 81.

B. The Flag Protection Act Of 1989

The United States charged all defendants under the Flag Protection Act of 1989 (Act), Pub. L. No. 101-131, 103

Stat. 777 (amending 18 U.S.C. § 700).³ The Flag Protection Act reflects Congress's attempt to continue to criminalize flagburning and other specified flag conduct in the wake of *Texas v. Johnson*. Congress understood that the Court's decision in *Johnson* implicitly invalidated the existing federal flag statute, and therefore sought to amend the flag statute to ensure that flagburning would remain a criminal act. S. Rep. No. 152, 101st Cong., 1st Sess. 9 (1989) (acknowledging "fatal flaw . . . in the existing Federal statute").

Prior to its amendment, 18 U.S.C. § 700 prohibited "knowingly cast[ing] contempt upon any flag of the United States by publicly mutilating, defacing, defiling, burning, or trampling upon it."⁴ In amending the statute, Congress removed the requirements that the actor "knowingly cast contempt" by a "public" act. It modified "defiling" to "physically defil[ing]," and added a proscription against "maintain[ing] the flag] on the floor or ground."

As amended, the Flag Protection Act of 1989 provides that "[w]hoever knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon any flag of the United States shall be fined under this title or imprisoned for not more than one year,

³ The government also charged the *Haggerty* defendants with destroying government property, under 18 U.S.C. § 1361-62, J.A. 34, but defendants do not challenge the constitutionality of that statute. Defendants have not admitted burning government property, nor has this charge been proven.

⁴ Pub. L. No. 90-381, 82 Stat. 291 (1968) (codified at 18 U.S.C. § 700) (1988) (amended 1989)).

or both." 18 U.S.C. § 700(a)(1). The amended statute includes an express exception, however, for some flagburning: the Act "does not prohibit any conduct consisting of the disposal of a flag when it has become worn or soiled." 18 U.S.C. § 700(a)(2).⁵ The statute defines "flag of the United States" as "any flag of the United States, or any part thereof, made of any substance, of any size, in a form that is commonly displayed." 18 U.S.C. § 700(b).⁶

C. The District Court Decisions

In both cases, defendants moved to dismiss the charges against them prior to trial on the grounds that the Act is unconstitutional on its face and as applied to their conduct. Both district courts followed *Johnson* and ruled that the Flag Protection Act is unconstitutional as applied to defendants' politically expressive flagburnings.

The courts first determined that defendants' conduct was sufficiently expressive to raise First Amendment

⁵ The House Report states that the disposal exception was added in response to "the apprehension that the statute would 'make criminals out of every member of a veterans' post that has a ceremonial burning of a worn-out flag on Memorial Day,' " and " 'would have the odd result of prosecuting veterans who destroy the flag, whom we really don't want to prosecute.' " H.R. Rep. No. 231, 101st Cong., 1st Sess. 9 (1989).

⁶ Neither the Act nor the legislative history define what forms of the flag are "commonly displayed," although the House Report states that some of the most commonly displayed forms are *not* covered, such as flags depicted on coffee cups and in newspapers, and "commercial and political uses of the flag." H.R. Rep. No. 101-231, *supra* at 11 and n.12.

concerns, a point no party disputed. *Haggerty* J.S. App. 5a; *Eichman* J.S. App. 9a-10a. Each court then concluded, as did this Court in *Johnson*, that strict First Amendment scrutiny should be applied, because the governmental interest in prohibiting flagburning – to preserve the flag's value as a symbol of the nation – is "related to the suppression of free expression." *Haggerty* J.S. App. 10a; *Eichman* J.S. App. 11a; *Johnson*, 109 S. Ct. at 2542. Accordingly, both courts found, the more lenient standard of First Amendment review articulated in *United States v. O'Brien*, 391 U.S. 367 (1968), is inapplicable, and the government must advance a compelling state interest to justify its prosecution. *Haggerty* J.S. App. 6a-13a; *Eichman* J.S. App. 11a.

The only interest Congress identified in enacting the Flag Protection Act was to preserve the flag's symbolic value, the precise interest this Court found insufficient in *Johnson*. *Haggerty* J.S. App. 13a-15a; *Eichman* J.S. App. 15a-17a; *Johnson*, 109 S. Ct. at 2547. In its amicus brief, counsel for the House Leadership also articulated an interest in the flag as an "incident of sovereignty," but both courts found that interest analytically indistinguishable from the interest in the flag's symbolic value. *Haggerty* J.S. App. 12a-13a; *Eichman* J.S. App. 14a-15a. Therefore, both courts concluded that the asserted governmental interests did not justify criminally punishing respondents for their politically motivated flagburnings. *Haggerty* J.S. App. 13a-15a; *Eichman* J.S. App. 15a-17a.

SUMMARY OF ARGUMENT

The United States flag was born of a "desecration." When George Washington took command of the Continental Army at Cambridge, Massachusetts in 1776, he defaced a British flag by ordering sewn upon it thirteen red and white stripes, subsequently referred to as "The Thirteen Rebellious Stripes."⁷ The question before this Court is whether the United States government may incarcerate its citizens for engaging in similar politically expressive flag desecration.

I. The Court answered this question last term in *Texas v. Johnson*, 109 S. Ct. 2533. *Johnson* established that the government may not criminalize flagburning to preserve the flag's symbolic value. A law so designed provokes stringent First Amendment scrutiny because it is necessarily directed at the communicative content of the proscribed flag conduct. And the government's interest in the symbolic value of the flag is insufficiently compelling to justify criminal punishment of politically expressive conduct. *Johnson* reaffirmed what this Court held forty-seven years ago in *West Virginia Board of Education v.*

⁷ Hart, *The Story of the American Flag*, 58 Am. L. Rev. 161, 167 (1924); see also *President's Proclamation Commemorating Flag Day and National Flag Week 1980*, 1 Pub. Papers 895 (May 12, 1980). Similarly, Pennsylvania's first flag consisted of a serpent superimposed on a British flag, "coiled, ready to strike, its head and fangs directed toward the English ensign above." 58 Am. L. Rev. at 171. The tradition of flag desecration continues to this day. In 1989, when the people of Romania, Yugoslavia, and East Germany rose up in protest against their respective governments, they carried national flags "desecrated" by excised centers.

Barnette, 319 U.S. 624, 640-42 (1943): the dual principles of freedom of expression and government by the people prohibit the State from mandating respect for its icons by imprisoning those who express disrespect. These principles compel dismissal of the prosecutions at issue here.

Congressional amici argue that the Flag Protection Act of 1989 is designed to "protect the physical integrity of the flag in all circumstances," and therefore should be treated differently from the Texas statute. But the Act is not so designed: it permits conduct that would imperil the flag's physical integrity, such as flying it in a storm, and it proscribes conduct that will have no effect on a flag's physical integrity, such as maintaining it on the floor or temporarily attaching a peace symbol to it.

More fundamentally, because "the flag" is not a physical object but an infinitely reproducible symbol, the only conceivable interest for protecting the flag's "physical integrity" is to preserve its symbolic value. And that interest, the Court has already held, cannot justify criminally punishing flagburning.

Nor can the Act be upheld as a restriction on the "manner" of expression, because it is content- and viewpoint-based. It singles out a particular politically charged symbol for "protection"; it proscribes only that flag conduct traditionally associated with dissent; it prohibits "physically defil[ing]" flags, an inherently viewpoint-based term; and while forbidding most "burning," it permits the burning of flags for disposal, the only flagburning deemed respectful under the Flag Code, 36 U.S.C. § 176(k).

II. The United States explicitly asks the Court to "reconsider" *Johnson*, but it implicitly asks the Court to reconsider the core principle of the First Amendment: that government may not prohibit political expression merely because it finds it offensive. The United States would have the Court rule that flagburning is unprotected expression because the government finds it an offensive and unimportant form of expression. But the First Amendment is needed precisely for expression that offends the government. The United States' proposed "exception" would swallow the rule of freedom of expression.

III. Finally, the Act is unconstitutional on its face. In addition to being content- and viewpoint-based, it is vague and substantially overbroad. It is impossible to discern which "flags" are covered by its proscriptions, or when a flag has become sufficiently "worn or soiled" to be open to desecration. And it forbids virtually all flag conduct associated with dissent.

ARGUMENT

I. THE FLAG PROTECTION ACT IS UNCONSTITUTIONAL AS APPLIED TO DEFENDANTS' POLITICALLY EXPRESSIVE CONDUCT

Texas v. Johnson controls these cases. It sets forth the appropriate legal analysis for defendants' as applied challenge, and requires that the Flag Protection Act of 1989 be declared unconstitutional as applied to defendants' politically expressive flagburnings. The analysis is straightforward: (1) defendants' conduct is expressive,

thereby raising First Amendment concerns; (2) the government's interest in regulating flagburning – to protect the flag's symbolic value – is by definition related to the suppression of expression, and therefore stringent First Amendment scrutiny applies; and (3) the government's symbolic interests are not sufficiently compelling to justify incarcerating political protesters for expressive conduct.

A. DEFENDANTS' BURNING OF THE FLAG AS PART OF AN OVERTLY POLITICAL DEMONSTRATION IS EXPRESSIVE CONDUCT PROTECTED BY THE FIRST AMENDMENT

The Court "must first determine whether [defendants'] burning of the flag constituted expressive conduct, permitting [them] to invoke the First Amendment." *Johnson*, 109 S. Ct. at 2538; *Spence v. Washington*, 418 U.S. 405, 409-10 (1974). No one disputes that defendants' flagburnings were sufficiently expressive to raise First Amendment concerns. U.S. Br. at 22; Sen. Biden Br. at 8.⁸ Because "[t]he very purpose of a national flag is to serve as a symbol of our country," this Court has "had little difficulty identifying an expressive element in conduct relating to flags." *Johnson*, 109 S. Ct. at 2539. Thus, the first step in the *Johnson* analysis is satisfied.

⁸ The flagburnings at issue here, as in *Johnson*, took place during overtly political demonstrations. Both demonstrations were announced in advance and widely reported. Written statements issued in connection with the flagburnings explained their political purpose. J.A. 55-57, 79. Defendants' declarations, summarized in the Statement of Facts, *supra*, further underscore the communicative intent of their actions.

B. STRICT FIRST AMENDMENT SCRUTINY APPLIES BECAUSE THE GOVERNMENT'S INTEREST IN PROTECTING THE FLAG IS RELATED TO THE SUPPRESSION OF EXPRESSION

One of two levels of First Amendment scrutiny applies where, as here, the government seeks to punish expressive conduct. The level of scrutiny turns on the nature of the government's reason for regulating the conduct. If Congress's interest in prohibiting particular flag conduct is related to the conduct's expressive content, the Act is indistinguishable from a restriction addressed to speech itself, and traditional strict First Amendment scrutiny applies.⁹ A less stringent standard, set forth in *United States v. O'Brien*, 391 U.S. 367 (1968), applies only if Congress's reason for prohibiting the conduct is "wholly unrelated" to its expressive content. *Buckley v. Valeo*, 424 U.S. 1, 17 (1976); *Johnson*, 109 S. Ct. at 2540-41.

Johnson squarely holds that an interest in "preserving the flag as a symbol of nationhood and national unity" "is related to expression in the case of . . . burning of the flag." *Johnson*, 109 S. Ct. at 2542. This is because the flag's symbolic value can be impaired, if at all, only to the extent that conduct expresses some message of disrespect for the flag. *Id.* The government's concern that the flag's symbolic meaning will be harmed "blossom[s] only when

⁹ *Johnson*, 109 S. Ct. at 2540-41; *Community for Creative Non-Violence v. Watt*, 703 F.2d 586, 622 (D.C. Cir. 1983) (Scalia, J., dissenting), *rev'd sub nom*, *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984).

a person's treatment of the flag communicates some message, and thus [is] related 'to the suppression of free expression' within the meaning of *O'Brien*." *Id.* at 2542; *Spence*, 418 U.S. at 414 n.8.

All parties have conceded that the Act's purpose is to protect the flag's symbolic value as an emblem of nationhood, the same interest Texas asserted in *Johnson*. The United States represents that the "interest – expressly identified by both the Congress and the President – that lies at the core of the statute [is] the preservation of the flag as the unique symbol of our Nation." U.S. Br. at 29. The Senate similarly concedes that "the government's interest [is] in preserving the flag as a national symbol." Sen. Br. at 5.¹⁰ While the House Leadership attempts to construct a distinct "sovereignty" interest, *see infra* Section I.C.3, it has also conceded that Congress's interest was in protecting the flag "as a symbol of the nation and guarantor of rights."¹¹

¹⁰ In the district court, the Senate also asserted, without a trace of irony, that the Act was designed "to serve notice that anyone may speak his or her mind under the protection of the flag." Memorandum of United States Senate as *Amicus Curiae*, *United States v. Eichman*, (Cr. Nos. 89-419/420/421 filed Jan. 12, 1990), at 33; *see also id.* at 31 (flag should be protected because it is "the symbol and the guardian of dissent").

¹¹ Memorandum of the Speaker and Leadership Group of the U.S. House of Representatives in Opposition to Defendants' Motion to Dismiss, *United States v. Eichman* (Cr. Nos. 89-419/420/421 filed Jan. 12, 1990), at 3 n.3. The asserted interest in protecting the flag as "an incident of sovereignty" is equally related to the suppression of expression. As the House Leadership brief demonstrates, the flag is an "incident of sovereignty" precisely for its communicative value. Br. at 25-36.

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Indeed, because "the flag" is not a physical object but a non-corporeal symbol, the *only* interest the government could have in protecting each of the symbol's infinite material representations is a symbolic one. Thus, the United States maintained in district court that "this interest in protecting the symbolic value of the Flag is the only conceivable interest the government has in protecting the physical integrity of the flag."¹²

The Act's legislative history underscores Congress's interest in protecting the flag's symbolic value. The Senate Report explains that the Act "is intended to protect the flag because of what it expresses and represents." S.

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Thus, an interest in the flag as an "incident of sovereignty" can only be harmed, if at all, by flag conduct that communicates a message inconsistent with the government's chosen meaning for the flag.

¹² Government's Memorandum in Opposition to Motion to Dismiss, *United States v. Eichman*, (Cr. Nos. 89-419/420/421 filed Jan. 12, 1990), at 15; *Hearings on Measures to Protect the Physical Integrity of the Flag: Hearings Before the Senate Comm. on the Judiciary*, ("Senate Hearings"), 101st Cong., 1st Sess. 118 (1989) (Letter of Attorney General Richard Thornburgh). As Justice Brennan stated in *Kime v. United States*, 459 U.S. 949, 953 (1982) (Brennan, J., dissenting from denial of certiorari) (emphasis added):

[t]he Government has no aesthetic or property interest in protecting a mere aggregation of stripes and stars for its own sake; the *only basis for a governmental interest (if any) in protecting the flag is precisely the fact that the flag has substantive meaning as a political symbol*. Thus, assuming that there is a legitimate interest at stake, it can hardly be said to be one divorced from political expression.

Rep. No. 101-152, *supra*, at 5.¹³ The House Report states that the Act "recognizes the diverse and deeply held feelings of the vast majority of citizens for the flag, and reflects the government's power to honor those sentiments through the protection of a venerated object." H.R. Rep. No. 101-231, *supra* at 9. In an additional statement by several committee members who voted for the statute, the House Report states:

No flag protection statute would, or ever could, be justified by anything other than the Government's interest in protecting the symbolic value of the flag. Any claim to the contrary would plainly be pretext and would be recognized as such by any court.

Id. at 17-18 (Additional Views of Congressman Sensenbrenner *et al.*).¹⁴

¹³ According to the Senate Report, the flag should be protected because it is a "unique and unalloyed symbol of the Nation," S. Rep. No. 101-152, *supra*, at 3, which reflects "all the rights and freedoms guaranteed under our Constitution," *id.*, "our Nation's precious heritage," *id.* at 2, and "the spirit of our democracy." *Id.* at 5.

Senators Hatch and Grassley, who opposed the statute because they felt it would be unconstitutional, stated without response from the majority report that:

it cannot be denied that the principal if not the only purpose in enacting a facially neutral statute is to prohibit expressive conduct that physically desecrates the flag. No one claims that we are interested in protecting the material, the thread, and the dye in the flag. We protect the flag as a symbol . . .

Id. at 24 (Minority Views of Hatch and Grassley).

¹⁴ To a person, the Act's sponsors and supporters on the floor of Congress reiterated their interest in guarding the flag's

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Thus, Congress's interest in regulating flag conduct arises from its concern for the flag's symbolic value. As this Court held in *Johnson*, because such an interest is related to the suppression of expression, the lenient *O'Brien* standard is inapplicable, and Congress must advance a compelling interest to justify the Act. *Johnson*, 109 S. Ct. at 2542.¹⁵

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symbolic value from expressive acts that they find offensive. See Amicus Curiae Brief of Authors' League of America *et al.*, at Section I.B.1.a. (collecting statements from Congressional Record). Senator Biden argues that the individual motives of legislators are irrelevant to determining Congress's purpose in enacting a statute. Sen. Biden Br. at 16-19. Here, however, the legislative history underscores the purpose that is evident on the face of the statute and that all branches of government acknowledge.

¹⁵ The House Leadership argues that because the Act is worded neutrally, *O'Brien* should apply. Both the premise and logic of this argument are flawed. First, the Act is not worded neutrally. See Section I.D *infra*. Second, it is the government's "interest" in regulating that renders *O'Brien* inapplicable. Thus, the Court in *Johnson* concluded that *O'Brien* was inapplicable *before* it turned to the face of the statute. 109 S. Ct. at 2542. Similarly, in *Spence*, the Court concluded, *without reference to the statute's terms*, that *O'Brien* was inapplicable because the government's "interest" in protecting the flag as a national symbol "is directly related to expression." *Spence*, 418 U.S. at 414 n.8. The statute in *Spence* was at least as "neutral" as the Flag Protection Act of 1989. It did not single out actions that cast contempt or seriously offend, and applied equally to a veteran respectfully placing his or her medals on the flag and to Mr. Spence's affixing a peace symbol. *Spence*, 418 U.S. at 414 n.9.

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C. THE GOVERNMENT'S ASSERTED INTERESTS ARE NOT SUFFICIENTLY COMPELLING TO JUSTIFY CRIMINALLY PUNISHING FLAGBURNING

The United States and congressional amici assert three interests to justify the Act: (1) preserving the flag's symbolic value; (2) preserving the flag's "physical integrity"; and (3) preserving the flag's function as an "incident of sovereignty." None of these interests is sufficiently compelling to justify incarcerating an individual for burning a flag in political protest.¹⁶

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That a purpose to suppress expression will render even a facially neutral statute subject to strict First Amendment scrutiny is also demonstrated by *Buckley v. Valeo*, 424 U.S. at 17. In that case, the Court applied strict First Amendment scrutiny to campaign finance restrictions that "d[id] not focus on the ideas expressed by persons or groups," because the government's interest in the restrictions – to neutralize the impact of wealth on election campaigns – "involve[d] 'suppressing communication.'" *Id.*

The dearth of support for the House Leadership's position is underscored by its heavy reliance on *United States v. Cary*, No. 88-5458, Slip op. (8th Cir. Feb. 26, 1990), a decision upholding the constitutionality of applying the 1968 federal flag statute to a flagburning that caused a breach of the peace. H.R. Br. at 17-20. Leaving aside whether a statute that is unconstitutional on its face can nonetheless be constitutionally applied, *Cary* is easily distinguishable, as no one has even hinted that a "breach of the peace" interest underlies the 1989 Act, much less either of the cases before the Court.

¹⁶ Significantly, no party, nor any member of Congress, stated that the government's interest is in protecting its own

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1. Preserving The Flag's Symbolic Value

In *Johnson*, this Court held that the government's interest in preserving the flag as a national symbol is insufficiently compelling to justify a prosecution for political flagburning. *Johnson*, 109 S. Ct. at 2543-48. While that interest allows the government to encourage people to respect the flag, it does not permit the government to compel people to show that respect under penalty of imprisonment. *Id.* at 2545. The same conclusion must be drawn here.

The United States argues that notwithstanding *Johnson*, this interest should now be found sufficient, because Congress has made a "considered legislative judgment" that it is compelling. U.S. Br. at 25-27.¹⁷ Passage of the

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flags. As the *Haggerty* case demonstrates, the government already has a means for protecting damage to its own property, whether it be a flag, a national monument, or an office stapler. 18 U.S.C. § 1361-62. These statutes are a less restrictive means of protecting the government's property interests, because they do not single out property with a particular symbolic content. *Cf. Boos v. Barry*, 108 S. Ct. 1157, 1166 (1988). Moreover, as the United States admits, the Flag Protection Act cannot be limited in its application to government-owned flags. U.S. Br. at 29-30 n.24. Thus, the fact that defendants in *Haggerty* are charged with burning a Post Office flag does not alter the constitutional analysis. *Id.*

¹⁷ In fact, none of the congressional amici claims that Congress's enactment of the Act establishes a compelling state interest. Instead, they urge application of a lenient standard of review, effectively conceding that their interests are not compelling.

Act, in its view, demonstrates a "national consensus . . . that physical destruction of the American flag . . . constitutes a violent assault on the shared values that bind our national community." *Id.* at 27. This Court has rejected such self-justifying arguments in the First Amendment context:

'[d]eference to a legislative finding cannot limit judicial inquiry where First Amendment rights are at stake . . . Were it otherwise, the scope of freedom of speech and of the press would be subject to legislative definition and the function of the First Amendment as a check on legislative power would be nullified.'

FCC v. League of Women Voters, 468 U.S. 364, 387 n.18 (1984) (quoting *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843-44 (1978)). The First Amendment was designed precisely to ensure that the majority not impose its notions of "consensus" on those who disagree.¹⁸ *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 638 (1943) ("The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, [and] to place them beyond the reach of majorities and officials"). The United States' view would leave the Bill of Rights to the whims of legislators.

¹⁸ In holding hearings on flag desecration, Congress expressly declined to hear oral testimony from anyone who, like defendants here, affirmatively believed that flagburning is an important means of political expression. See House Hearings, *supra* at 472 (Written Testimony of Emergency Committee on the Supreme Court Flag-Burning Case). Thus, the alleged "consensus" on this issue had to be artificially constructed in the legislative record by excluding opposing views. It is also worth noting that with one exception, all of the amici supporting the Act are government bodies or officials.

If the flag is to symbolize " 'all the rights and freedoms guaranteed under our Constitution,'" S. Rep. No. 101-152, *supra*, at 3, people must be as free to destroy it as they are to wave it. *Haggerty* J.S. App. 16a. And if Congress wants people to respect the flag, that goal is undermined, not furthered, by a law punishing acts of disrespect. True respect requires the freedom to choose whether to pay respect. Finally, the flag is an infinitely reproducible symbol, and there is no showing that burning, temporarily defiling, or laying on the floor one or more of its representations harms its continuing function as a symbol. "[U]ndifferentiated fear . . . is not enough to overcome the right to freedom of expression." *Tinker v. Des Moines Ind. Comm. School District*, 393 U.S. 503, 508 (1969).

2. Preserving The "Physical Integrity" Of Flags

The congressional amici contend that the Act should be upheld because it is aimed at protecting "the physical integrity of the flag in all circumstances." Sen. Br. at 27-28; H.R. Br. at 11-17; Sen. Biden Br. at 26-27. This argument, based on dicta in *Johnson*, 109 S. Ct. at 2543, and a dissent by Justice Blackmun in *Smith v. Goguen*, 415 U.S. 566, 590-91 (1974) (Blackmun, J., dissenting), fails for two reasons.

First, the Act is not "aimed at protecting the physical integrity of the flag in all circumstances," for the same reason that this Court found that the Texas statute in *Johnson* was not so aimed: it contains an exception for the

burning and physical destruction of worn or soiled flags. *Johnson*, 109 S. Ct. at 2543. As the Court stated:

If [Johnson] had burned the flag as a means of disposing of it because it was dirty or torn, he would not have been convicted of flag desecration under this Texas law: federal law designates burning as the preferred means of disposing of a flag 'when it is in such condition that it is no longer a fitting emblem for display,' and Texas has no quarrel with this means of disposal. *The Texas law is thus not aimed at protecting the physical integrity of the flag in all circumstances*, but is designed instead to protect it only against impairments that would cause serious offense to others.

Id. (emphasis supplied). Significantly, the Massachusetts statute Justice Blackmun voted to uphold in *Smith v. Goguen* contained no such disposal exception. *Goguen*, 415 U.S. at 569 n.3 (quoting Massachusetts flag statute).

The Act is both underinclusive and overinclusive with respect to a flag's "physical integrity."¹⁹ One may not lay the flag on the floor even under a glass covering that will preserve it from all physical harm whatsoever. Yet one may wave the flag where its physical integrity will be greatly endangered, as in bad weather or battle.²⁰

¹⁹ See *FCC v. League of Women Voters*, 468 U.S. at 396 ("The patent overinclusiveness and underinclusiveness of [a statute] 'undermines the likelihood of a genuine [governmental] interest.'") (quoting *First National Bank v. Bellotti*, 435 U.S. 765, 793 (1978)).

²⁰ Senator Biden tries to distinguish such conduct on the ground that one who exposes a flag to danger has not "acted to harm the flag." Sen. Biden Br. at 13 n.3 (original emphasis). But

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The Act prohibits conduct that temporarily "defiles" or "defaces" the flag, without any lasting injury to the flag's physical integrity.²¹ A person can be convicted for throwing dirt on her privately owned flag even if she immediately washes it off and no harm is done to the flag's physical integrity. Thus, the statute is not aimed at protecting the flag's physical integrity in all circumstances.²²

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surely deciding to fly a flag in the heart of a storm constitutes "action" as much as maintaining the flag on the floor. The House Leadership protests that "neither weather nor the gunfire of an enemy . . . are susceptible to statutory control." H.R. Br. at 8 n.10. But weather and gunfire will do a flag no harm unless a human being affirmatively exposes the flag to such dangers in the first place.

²¹ As examples of acts that "physically defile," Senator Wilson, who introduced this clause, referred to tossing dirt or wiping soluble grease on the flag, both of which, he postulated, could be cleaned off, thereby having no effect on the flag's physical integrity. 135 Cong. Rec. S12616 (daily ed. Oct. 4, 1989). Senator Biden responded that the amendment was unnecessary because the prohibition on "defacing" already covered temporary dirtying of a flag that does no permanent harm. *Id.* at S12617. Yet Senator Biden's amicus brief repeatedly states that the Act does not prohibit temporary harm to the flag. Sen. Biden Br. at 11-13. Such ephemeral "harm" to the flag is the precise type of conduct the Court protected in *Spence v. Washington*, 418 U.S. at 415.

²² Even if the Act were so designed, that would not justify its application to a politically expressive act of flagburning. Justice Blackmun's dissent in *Smith v. Goguen* was addressed solely to the facial validity of the statute. *Goguen* made no showing that the flag patch had a communicative purpose. 415 U.S. at 568 and n.1 (*Goguen* was "not engaged in any demonstration or other protest," and there was no record of *Goguen's*

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Second, and more fundamentally, there is an inherent flaw in the "physical integrity" logic: there is no reason for protecting the "physical integrity" of reproductions of the flag other than preserving the flag's symbolic value. "The flag" is not a physical thing, but a symbol, and therefore the *only* interest the government has in "protecting" it is symbolic. See Section I.B., *supra*.²³ Under *Johnson*,

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"purpose in wearing a flag on the seat of his trousers"); *id.* at 590 (Blackmun, J., concurring) (characterizing Goguen's act as nothing more than an "immature antic"). Justice Blackmun's dissent therefore does not apply to conduct that seeks to communicate a political message. Defendants believe that any prosecution of flag "misuse," even absent evidence of communicative intent, violates the First Amendment, because the government's interest in prosecuting would still be to preserve the flag's symbolic value. However, as in *Johnson*, the Court need not reach this question. *Johnson*, 109 S. Ct. at 2538 n.3.

²³ See L. Tribe, *American Constitutional Law* 801-02 (2d ed. 1988) (statute directed solely at physical integrity of flag would be unconstitutional because only conceivable governmental interest would be "preserving the flag as a national symbol"). For this reason, it is irrelevant that the government may protect bald eagles, gravesites, places of worship, or national monuments. Sen. Biden Br. at 14-15. In all these examples, the government has an independent interest in regulating that is unrelated to expression: either it is protecting its own property or that of others for particular uses (gravesites, the Vietnam Memorial), or the object of regulation is rare (bald eagles). Here, the government seeks to regulate use of a symbol *solely* because of what destruction or defilement of that symbol communicates. The analogy would be more accurate if Congress sought to punish criminally anyone who destroyed or desecrated models or reproductions of bald eagles or national monuments. See House Hearings, *supra*, at 194-95 (Oral Testimony of Barr).

that interest triggers strict scrutiny, and by definition cannot satisfy such scrutiny. Thus, because a statute aimed at protecting the physical integrity of the flag in all circumstances is necessarily designed to suppress attacks on the flag's symbolic value, it would be unconstitutional.

The Senate Brief unwittingly demonstrates the necessary, and necessarily fatal, link between the flag's "physical integrity" and symbolic value. The Senate purports to show that flag laws have historically been designed "to protect the flag's physical integrity without regard to any message that individuals may seek to convey through their use of it." Sen. Br. at 6. But the history demonstrates precisely the opposite: the only reason Congress and the "patriotic societies"²⁴ have advanced for protecting the flag has been to keep its symbol "'sacred.'" Sen. Br. at 32 (quoting American Flag Association, *Circular of Information* 16 (1900)).²⁵ Thus, the very first House Report to

²⁴ It is no accident that those who have lobbied hardest for flag legislation have been "patriotic organizations." In addition to the Daughters of the American Revolution and the Society of Colonial Wars noted by the Senate, the organizations that have pushed for flag legislation have included the American Legion, which is designed to "foster and perpetuate a one hundred percent Americanism," and the Ku Klux Klan, whose purposes include "to keep eternally ablaze the sacred fire of a fervent devotion to a pure Americanism." D. Manwaring, *Render Unto Caesar: The Flag Salute Controversy* 6-7 (1962).

²⁵ Similarly, the National Flag Committee of the Society of Colonial Wars in the State of Illinois reported that its purpose was to "secure the passage of a bill . . . to prevent the use of our national flag and its patterns for other than legitimate and

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propose flag legislation states that the flag "should be held a thing sacred, and to deface, disfigure, or prostitute it to the purposes of advertising should be held a crime against the nation." H.R. Rep. No. 2128, 51st Cong., 1st Sess. 1 (1890).

The American Flag Association's model statute, adopted by many states and by Congress for the District of Columbia, applied to anyone who would, *inter alia*, "publicly deface, or defy, or defile, or cast contempt, either by words or act, upon any such flag" of the United States. Sen. Br. at 13. Congress did not enact nationwide flag protection legislation until 1968, when people began to burn the flag to protest an unpopular war. The purpose underlying such statutes can hardly be said to be "without regard to any message that individuals may seek to convey through their use of [the flag]." Sen. Br. at 6. On the contrary, throughout the history of flag laws, conduct that reflects reverence for the flag, such as the flag salute, has been either permitted or compelled, while conduct that reflects disrespect has been criminally proscribed.²⁶

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patriotic purposes." National Flag Committee of the Society of Colonial Wars in the State of Illinois, *The Misuse of the National Flag of the United States of America* 1 (1895) (emphasis added). The Committee maintained that "our national flag and its patterns should command reverence, respect, and legal protection from mercenary persons" because "Old Glory is too sacred a symbol to be misused by any party, creed, or faction." *Id.* at 8-9.

²⁶ Flag protection statutes invariably have been enforced against critics of the government. It is no coincidence that Mr. Street was protesting the government's failure to protect civil

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The fact that patriotic societies were initially sparked by partisan and commercial "desecration" rather than political flagburnings does not diminish the fact that their concern was with the message of disrespect such uses conveyed for a political symbol that they felt should be kept "sacred."²⁷ That is a symbolic concern, and is

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rights workers, that Mr. Spence was protesting the government's involvement in the Vietnam War, and that Mr. Johnson was protesting President Reagan's policies. The vast majority of flag prosecutions arose in the Vietnam War era, and were directed at anti-government protesters. See Rosenblatt, *Flag Desecration Statutes: History and Analysis*, 1972 Wash. U. L.Q. 193, 194 (and cases cited therein). People have been prosecuted under flag laws for saying "to hell with the flag," Prosser, *Desecration of the American Flag*, 3 Ind. Legal F. 159, 163-64 (1969); for failing to accede to a mob's demands to kiss the flag, *Ex Parte Starr*, 263 F. 145 (D. Mont. 1920); for flying the flag from an outhouse, Prosser, *supra* at 169; for refusing to salute the flag, *id.* at 174; and for exhibiting art that "dishonor[s]" the flag, *People v. Radich*, 26 N.Y.2d 114, 308 N.Y.S.2d 846, 257 N.E.2d 30 (1970). See generally Prosser, *supra* at 160-93 (listing hundreds of prosecutions for flag desecration).

²⁷ Thus, the National Flag Committee of the Society of Colonial Wars in the State of Illinois cited with disapproval many instances of flag "desecration," from a father who instructed his children not to pledge allegiance to the flag, *Misuse of the National Flag*, *supra* at 11, to a railroad clerk who referred to the flag as a "dirty rag," *id.* at 13, to a "certain champion bicyclist [who] covers his loins when on a wheel" with a flag-patterned "breech-clout." *Id.* at 17. See also *Hearing on S.226, S.596, S.1220, and S.3504 Before the Senate Committee on Military Affairs*, 57th Cong., 1st Sess. 4 (1920) (American Flag Association lists, among common acts of flag desecration that should be addressed by legislation, an incident in which anarchists "tor[e] to shreds and stamped upon" an American flag).

inherently related to the suppression of expression in the context of statutes criminalizing "improper" flag conduct.

History confirms what logic dictates: the only conceivable interest Congress has in protecting the "physical integrity" of a non-corporeal symbol is inextricably related to maintaining its symbolic value. And that interest, this Court has held, is not sufficient to justify incarcerating people for political expression.

3. Preserving an "Incident of Sovereignty"

Apparently inspired by a misreading of a single phrase in a D.C. Circuit opinion, the House Leadership asserts another governmental interest: protecting the flag as an "incident of sovereignty."²⁸ House counsel devotes many pages to developing a historical basis for this alleged government interest, H.R. Br. at 20-40, presumably

²⁸ See *Joyce v. United States*, 454 F.2d 971, 985 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 969 (1972) (upholding constitutionality of 1968 federal flag statute). The court in *Joyce* did not advance this as the government's interest for the 1968 statute, but as a basis for Congress's Article I power to legislate in this area at all. *Id.* When the court analyzed Congress's interest for enacting the statute, it characterized it as protecting the flag's symbolic value. *Id.* at 988 (interest "in having a symbol to represent them as a nation").

This Court has never ruled on Congress's affirmative power to enact criminal legislation concerning the flag. While dicta in cases such as *Joyce* assumes that Congress has such power, there is no express provision authorizing such legislation in the Constitution. Thus, Congress seeks here to impose criminal punishment in an area in which it has no power to legislate.

because not a single sentence from the Act's voluminous legislative history suggests that anyone in the 1989 Congress even considered this factor. Both district courts found that counsel had constructed this "interest" after-the-fact without any support in the legislative record. *Haggerty* J.S. App. 12a; *Eichman* J.S. App. 15a.²⁹

Even if this interest actually supported the Act, it would not alter the legal analysis. First, House counsel never explains how flagburning or the other proscribed conduct undermines the flag's value as an "incident of sovereignty." Does the fact that Gregory Johnson burned a flag in 1984, that defendants burned flags on the steps of Congress, or that Scott Tyler placed a flag on the floor in an art exhibit, mean that the flag no longer serves its function in demarcating geographical boundaries and identifying ships?

The history detailed by the House itself demonstrates that flagburnings do *not* undermine the flag's function as an "incident of sovereignty." The flag is as much an "incident of sovereignty" today as it ever was, notwithstanding countless instances of flagburnings and other flag "insults" over the course of its two centuries of existence. H.R. Br. at 29-38. Thus, this interest "is simply not implicated on these facts, and in that event the interest drops out of the picture." *Johnson*, 109 S. Ct. at 2539; *Spence*, 418 U.S. at 414.³⁰

²⁹ Significantly, the Senate's historical review of flag laws never even mentions this concern for the flag's boundary-demarcating "sovereignty" function.

³⁰ The House Leadership likens the "incident of sovereignty" interest to a trademark interest, H.R. Br. at 22, an

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Second, even if this interest were threatened by flag-burning, it is no more compelling than the government's interest in the flag's symbolic value. The government's interest in having a symbol to mark ships cannot justify jailing its citizens for burning reproductions of that symbol as a means of political protest.³¹

D. The Act's Application Cannot Be Upheld as a Content-Neutral Time, Place or Manner Restriction

Senator Biden maintains that the Act should be upheld as a content-neutral "time, place, or manner" restriction. Sen. Biden Br. at 9-25. The Court has recognized that this test is virtually indistinguishable from the *O'Brien*

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interest this Court discussed and rejected in *Spence*, because there, as here, "[t]here was no risk that appellant's acts would mislead viewers into assuming that the Government endorsed his viewpoint." 418 U.S. at 414.

³¹ The House Leadership's reliance on the Framers, H.R. Br. at 29-36, is misplaced. First, in none of the historical examples presented do the Framers express an opinion on whether a law prohibiting flagburning would be constitutional under the First Amendment. At most, the examples demonstrate the unremarkable fact that the Framers understood the meaning of flag desecration. Significantly, Congress did not pass a flag desecration law until 1917, well after the Framers could offer their opinion. If the Framers' views are relevant, the most pertinent evidence would be their views on the Sedition Act of 1789, noted by this Court in *New York Times v. Sullivan*, 376 U.S. 254, 273-76 (1964). That evidence makes clear that the Framers considered criticism of one's government, which is ultimately what flag desecration amounts to, *essential* to a constitutional democracy. *Id.*

standard,³² and thus it should come as no surprise that the Act also fails the time, place, or manner requirements. A statute designed to protect the flag's symbolic value is by definition content-based, and therefore fails the requirement that a time, place, or manner restriction be content-neutral. *Ward v. Rock Against Racism*, 109 S. Ct. 2746, 2754 (1989). Moreover, the Act's facial terms are content- and viewpoint-based.

1. The Act is Content-Based Because its Purpose is to Protect the Flag's Symbolic Value

As noted above, the governmental interest underlying the Act is to preserve the flag's symbolic value. The Act thus seeks to suppress expressive conduct *because of* its communicative nature, and is by definition content-based. *Community for Creative Non-Violence v. Watt*, 703 F.2d at 622 (Scalia, J., dissenting). Government regulation of expressive activity is content-neutral only where it is " 'justified without reference to the content of the regulated speech.' " *Rock Against Racism*, 109 S. Ct. at 2754 (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. at 293); *Boos v. Barry*, 108 S. Ct. 1157, 1164 (1988); *Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976). "The government's purpose is the controlling consideration." *Rock Against Racism*, 109 S. Ct. at 2754. If the government's *reason* for

³² "[T]he four-factor standard of *United States v. O'Brien* . . . in the last analysis is little, if any, different from the standard applied to time, place, or manner restrictions." *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 298 (1984).

enacting a statute is related to content, the statute is content-based no matter how "neutrally" it is worded.³³

For this reason, Assistant Attorney General Barr argued, the notion that a "facially neutral" flag statute would survive constitutional review is "demonstrably wrong." House Hearings, *supra* at 179. A flag protection statute is necessarily content-based because "[t]he restrictions imposed on speech, even by a facially neutral Flag desecration statute, neither would nor ever could be justified by anything other than the Government's interest in protecting the symbolic value of the Flag." *Id.* at 181. Where, as here, the admitted interest (and the only conceivable interest) underlying the Act is related to suppressing expression, it would not matter if the statute were somehow facially neutral.

2. The Act is Facially Content-Based Because it Singles Out a Particular Political Symbol for Protection

Any attempt to single out a particular non-material symbol for "protection" is inherently content-based. See *Tinker v. Des Moines Ind. Comm. School District*, 393 U.S. at 510-11 ("A particular symbol . . . was singled out for prohibition"); Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 Harv. L. Rev. 1482, 1506-08 (1975). Senator Biden and the House Leadership argue that the fact that

³³ See also L. Tribe, *American Constitutional Law* 794-95 n.4 (2d ed. 1988) (to determine whether strict or lenient First Amendment scrutiny applies, "[t]he critical inquiry is whether the state chooses to (or must) justify the regulation by reference to dangers that flow from an act's communicative content").

the Act does not use phrases like "cast contempt" or "seriously offend" renders it content-neutral. Sen. Biden Br. at 6, 12; H.R. Br. at 11. But if that were the case, Congress could constitutionally criminalize "[w]hoever knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon any [emblem of the Democratic party]." ³⁴ Under Senator Biden's theory, such a statute would be a content-neutral restriction on the "manner" of expression. Sen. Biden Br. at 12-16. The House Leadership could equally argue that Congress was "neutrally 'protecting the physical integrity' " of this symbol. H.R. Br. at 9. Yet no one would dispute that such a statute would be content-based.

While the American flag may encompass a wider spectrum of political views than the symbol of the Democratic Party, it is no less politically charged. The constitutional infirmity in "protecting" the flag is the same as that posed by "protection" of any other political symbol: By singling out one symbol and one set of messages for "protection," the Act discriminates on the basis of content.³⁵

³⁴ Such an evolution from statutes prohibiting desecration of the national symbol to statutes prohibiting desecration of the party symbol is precisely what happened in Nazi Germany. See Brief for Respondent in *Texas v. Johnson*, No. 88-155 (1989) at 16 n.16 (detailing development of flag desecration statutes in Nazi Germany).

³⁵ The same argument would hold true for any symbol. The Court has thus already recognized the slippery slope presented by allowing the government to regulate the flag.

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3. The Act is Viewpoint-Based Because it Proscribes Only That Flag Conduct Historically Associated With Dissent and Disrespect

The Act is viewpoint-based in the scope of flag use that it permits and proscribes.³⁶ It prohibits those uses of the flag traditionally associated with opposition to the government, while permitting those uses of the flag associated with support of the government. People are free to wave the flag, no matter how dangerous the circumstances, but are not permitted to lay it on the ground, no matter how secure the resting place.

As Assistant Attorney General Barr testified:

The premise of the statute is that it is neutral . . . But let us really take a look at that neutrality. It is not neutral. Where did these verbs come from? Trample, deface, lay on the ground, burn, those are not things people do when they are using the flag in a positive way normally. Why have we not included other verbs in that prohibition? A purely neutral approach to the flag would say either everyone can use it or no one can use it. These verbs were

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Johnson, 109 S. Ct. at 2546; Senate Hearings, *supra* at 67-68 (Oral Testimony of Barr). It is no answer to assert that the flag "does not represent any single idea or value," Sen. Biden Br. at 15-16, as this Court noted in *Johnson*, 109 S. Ct. at 2544 n.9. The Democratic Party's symbol does not represent a "single idea or value." In fact, one would be hard-pressed to find any symbol that represents only a single idea or value.

³⁶ A viewpoint-based statute regulates expression "in ways that favor some viewpoints or ideas at the expense of others," and is presumptively unconstitutional. *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984).

picked for a reason. They are things that people commonly do to show disrespect, deface the flag.

Senate Hearings, *supra* at 116 (Oral Testimony of Barr).

That Congress chose the prohibited forms of conduct because of their historical use in expressing dissent is perhaps best exemplified by the genesis of the clause prohibiting "maintain[ing the flag] on the floor or ground." Congress added this clause in direct response to defendant Scott Tyler's exhibit at the School of the Art Institute of Chicago, in which a flag was maintained on the floor. Because the then-existing federal flag statute did not prohibit such conduct, Senator Dole introduced an amendment to address it. That language continues in the Flag Protection Act of 1989.³⁷

4. The Prohibition on "Physically Defil[ing]" the Flag Is Viewpoint-Based

The Act's prohibition on "physically defil[ing]" flags is also viewpoint-based. In the 1968 statute's legislative history, Congress expressly defined "defile" to include all acts that "dishonor" the flag, an inherently viewpoint-based term. H.R. Rep. No. 350, 90th Cong., 1st Sess. 4

³⁷ Senator Dole introduced the precursor to this clause on March 16, 1989, shortly after Mr. Tyler's art exhibit opened. See 135 Cong. Rec. S2811 (daily ed. March 16, 1989). Senator Dixon, speaking in support of the bill, noted "[w]e have a situation in Chicago, Mr. President, where the U.S. flag has been portrayed in art in a manner that has raised the ire and offended the sensibilities of many Americans." *Id.* The Senate approved the bill 97-0. *Id.* at S2812.

(1967). Modifying this verb to cover only acts that "physically" dishonor the flag is redundant, and in no way remedies its viewpoint bias.

The 1989 Act's drafters initially removed "defile" altogether from the prior flag statute, recognizing its constitutional infirmity. See H.R. Rep. No. 101-231, *supra* at 8. Congress resurrected the prohibition, however, precisely to criminalize conduct that does no lasting harm to the flag's physical integrity, but that "injur[es] the flag as a symbol of the United States," and that "is offensive because it does violence of some kind to a unique national symbol." 135 Cong. Rec. at S12616 (daily ed. Oct. 4, 1989).³⁸ Both the common-sense understanding of "defile" and the legislative history support the conclusion that it is directed at acts that express hostility to the flag's symbolic value.

5. The Exception for Disposing of Worn or Soiled Flags Renders the Act Viewpoint-Based

The exception for disposing of "worn or soiled" flags also reveals the statute's viewpoint bias, for it renders the

³⁸ Senator Biden objected to the "physically defile" amendment on the ground that "[d]efile, arguably – and I do not want to provide the Court with any arguments along these lines – goes to speech . . . It connotes that there is a communicative, a verbal injury that you can inflict upon someone or something when you say defile." 135 Cong. Rec. at S12617. Senator Wilson, the amendment's sponsor, responded by pointing out that "defaces, disfigures, or mutilates" similarly prohibit conduct "signifying some vague and unexplained hostility." *Id.* at S12618.

same conduct – burning a flag – permissible for some reasons and not for others. Professor John Hart Ely has argued that because the "proper" way to dispose of a worn flag is to burn it, *see, e.g.*, 36 U.S.C. § 176(k), no flag desecration statutes are likely to be viewpoint-based. Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 Harv. L. Rev. at 1502-03, 1504 n.90. This Court in *Johnson* specifically stated that an exception for flag disposal renders a flag protection statute unconstitutionally viewpoint-based:

If we were to hold that a State may forbid flag-burning wherever it is likely to endanger the flag's symbolic role, but allow it wherever burning a flag promotes that role – as where, for example, a person ceremoniously burns a dirty flag – we would be saying that when it comes to impairing the flag's physical integrity, the flag itself may be used as a symbol . . . only in one direction.

Johnson, 109 S. Ct. at 2546. The Flag Protection Act makes that exception explicit, and is therefore viewpoint-based on its face.³⁹

³⁹ The United States and amici are conspicuously silent on this critical provision. In the district court, the Senate defended the exception on the ground that once a flag is worn or soiled, the government no longer has any interest in maintaining its physical integrity, but this argument is doubly flawed. First, the House Report reveals that this argument is merely a rationalization, admitting that the disposal exception was added in response to "the apprehension that the statute would 'make criminals out of every member of a veterans' post that has a ceremonial burning of a worn-out flag on Memorial Day,' "

(Continued on following page)

Thus, both because its purpose is to suppress communicative flag conduct, and because it is facially viewpoint- and content-based, the Act cannot be upheld as a time, place, or manner restriction.

II. THE COURT SHOULD NOT RECONSIDER *TEXAS v. JOHNSON*, WHICH REFLECTS A FUNDAMENTAL AND LONG-STANDING PRINCIPLE OF FIRST AMENDMENT JURISPRUDENCE: THAT GOVERNMENT MAY NOT PROHIBIT POLITICAL EXPRESSION MERELY BECAUSE IT FINDS IT OFFENSIVE

Justice Jackson noted forty-seven years ago in *West Virginia Board of Education v. Barnette*, 319 U.S. at 641, that while cases challenging compulsory flag laws may be politically difficult, the legal "principles of . . . decision" are not "obscure." See also *Johnson*, 109 S. Ct. at 2548 (Kennedy, J., concurring). Justice Jackson's statement applies with even greater force today, for the "bedrock

(Continued from previous page)

and " 'would have the odd result of prosecuting veterans who destroy the flag, whom we really don't want to prosecute.' " H.R. Rep. No. 101-231, *supra* at 9.

Second, the government's interest in the flag's symbolic value does not evaporate once a flag is worn or soiled. For example, some of the most heavily worn and soiled flags in existence are those that have survived battles, such as the flags that flew over Fort Sumter or Fort McHenry. They are displayed to this day in museums and people's homes across the country. The symbolic value of these flags is no less than that of new flags. Thus, the "disposal" exception cannot be rationalized on grounds that the government has no interest in preserving worn or soiled flags.

principle[s]" that govern these appeals have not only been long established, but were squarely reaffirmed last term in *Texas v. Johnson*. For this reason, the Administration was surely correct when it testified that "it cannot be seriously maintained that a statute aimed at protecting the Flag would be constitutional." House Hearings, *supra* at 183.

Straining for some consistency with its congressional testimony, the United States in district court conceded that flagburning was expressive conduct and that any statutory attempt to criminalize it must be justified by strict First Amendment scrutiny. U.S. Br. at 22, 19 n.20. It now advances the opposite view, namely that flag desecration should be treated like child pornography, defamation, and "fighting words," and accorded no First Amendment protection whatsoever. U.S. Br. at 28-40.

This Court flatly rejected a similar argument from Texas that flagburning should be likened to "fighting words." *Johnson*, 109 S. Ct. at 2542. The other examples the United States provides are unprotected for reasons inapplicable here: child pornography is unprotected because of the government's compelling interest in protecting children, *New York v. Ferber*, 458 U.S. 747, 756-57 (1982); defamation, like fighting words, harms a particular individual and, where it involves a matter of public concern, must be by definition both false and malicious, *New York Times v. Sullivan*, 376 U.S. at 279-80; and obscenity, also by definition, has no serious political value. *Miller v. California*, 413 U.S. 15, 24 (1973).

To create an "exception" for overtly political communication such as flagburning would require reversing not

only *Johnson*, but the "bedrock principle" upon which it rested: "the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Johnson*, 109 S. Ct. at 2544 (and cases cited therein).⁴⁰ It has long been established that "the use of an offensive form of expression may not be prohibited to adults making what the speaker considers a political point." *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 682 (1986); *Cohen v. California*, 403 U.S. 15 (1971).

Were the government permitted to proscribe what it deems offensive in political expression, freedom of expression would be imperiled across the board.⁴¹ The notion that the government may incarcerate its citizens whenever it decides that the value of political expression is "outweighed by its demonstrable destructive effect on

⁴⁰ The United States attempts by sheer rhetoric to distinguish flagburning from criticism of the flag or other "offensive" conduct, repeatedly characterizing flagburning as "violent," "destructive," a "physical assault," a "physical attack," and "physical destruction." See, e.g., U.S. Br. at 27, 36-39. Hyperbole aside, it should not be forgotten that Congress's concern is not with physical assaults on pieces of cloth, but with symbolic assaults on "the flag."

⁴¹ As Justice Harlan stated in *Cohen v. California*, 403 U.S. at 21 (emphasis added):

The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is, in other words, dependent upon a showing that personal privacy interests are being invaded in an essentially intolerable manner. Any broader view of this authority would effectively empower a majority to silence dissidents simply as a matter of personal predilection.

society as a whole or on particular overarching social policies," U.S. Br. at 33, has "no discernible or defensible boundaries." *Johnson*, 109 S. Ct. at 2546. It would essentially resurrect the concept of seditious libel.

The United States admits that its argument is "in tension" with the Court's analysis in *Johnson*. U.S. Br. at 42. This is akin to saying that "separate but equal" is "in tension" with *Brown v. Board of Education*, 343 U.S. 579 (1952). The United States nonetheless maintains that two factors "strongly suggest that an underlying premise of *Texas v. Johnson* – that flag burning is subject to full First Amendment protection – should be abandoned": (1) the ruling is "inconsistent with basic assumptions about the nature of the Constitution"; and (2) the ruling "disserve[s] principles of democratic self-governance." U.S. Br. at 43 (quoting *Garcia v. San Antonio Metro Trans. Auth.*, 469 U.S. 528, 547-55 (1985)). These factors only underscore that *Texas v. Johnson* was correctly decided.

First, far from being "inconsistent with basic assumptions about the nature of the Constitution," U.S. Br. at 43, *Texas v. Johnson* merely confirms the principles that governed each of the Court's prior First Amendment decisions on flag regulation. It recognizes (1) that expression critical of government policies is at the core of First Amendment values;⁴² (2) that patriotism may be encouraged but not compelled;⁴³ (3) that these principles apply

⁴² *Johnson*, 109 S. Ct. at 2543; *New York Times v. Sullivan*, 376 U.S. at 269-72; *Stromberg v. California*, 283 U.S. 359, 369 (1931).

⁴³ *Johnson*, 109 S. Ct. at 2546-48; *Barnette*, 319 U.S. at 640.

equally to speech and conduct toward the United States flag;⁴⁴ and (4) that compulsion is constitutionally forbidden whether it is effected by affirmative flag salute requirements or by criminal prohibitions on flag "misuse."⁴⁵

Second, the "principles of democratic self-governance" certainly do not require that government be empowered to incarcerate its critics for attacking its political symbols. On the contrary, self-governance demands that citizens be accorded freedom to choose whether to pay respect to a state's icon. When a government attempts by criminal statute to render its own symbols "'sacred and free from any alteration or desecration whatever,'" Sen. Br. at 32 (quoting American Flag Association, *Circular of Information* 16 (1900)), it places the sanctity of its official symbols above the reality of human freedom. This lesson was graphically illustrated last year by the Ayatollah Khomeini's death threat against author Salman Rushdie for "desecrating" the Muslim faith. Justice Jackson warned that compulsory flag laws differ only in degree:

Ultimate futility of such attempts to compel coherence is the lesson of every such effort from the Roman drive to stamp out Christianity as a disturber of its pagan unity, the Inquisition, as a means to religious and dynastic unity, the Siberian exiles as a means to Russian unity, down to the fast failing efforts of our present totalitarian enemies. Those who begin co

⁴⁴ *Johnson*, 109 S. Ct. at 2545; *Spence*, 418 U.S. at 412; *Street*, 394 U.S. at 593.

⁴⁵ *Johnson*, 109 S. Ct. at 2545; *Spence*, 418 U.S. at 415; *Street*, 394 U.S. at 593.

elimination of dissent soon find themselves exterminating dissenters . . . [T]he First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings.

Barnette, 319 U.S. at 641.

And as the district court in *Haggerty* noted, this lesson is all the more vivid in light of world events of 1989:

This is an inspiring time for those of us who treasure freedom. Countries all over the world are striving to adopt democratic principles derived from our Constitution as part of their forms of government. The freedom of speech enshrined in our First Amendment is the crucial foundation without which other democratic values cannot flourish. It is a tribute to the strength of our nation and to our faith in democratic government that even a means of protest which is profoundly painful and offensive to many people is protected.

Haggerty J.S. App. 16a.

To uphold *Johnson* and the district court's decisions is not to adopt a "pure libertarian vision of our system of free expression," U.S. Br. at 38, nor to require the government to be "a philosophical cipher, standing for absolutely nothing." Sen. Biden Br. at 14. It is simply to reaffirm that "[f]reedom to differ is not limited to things that do not matter much . . . The test of its substance is the right to differ as to things that touch the heart of the existing order." *Barnette*, 319 U.S. at 642.

III. THE ACT IS UNCONSTITUTIONAL ON ITS FACE

The Act is also unconstitutional on its face, because it is content-based, overbroad and vague. Defendants have

demonstrated the content-based nature of the statute in Section I.D, *supra*. As a content-based statute, the Act is unconstitutional absent a compelling state interest. *Boos v. Barry*, 108 S. Ct. at 1164.

The Act is also hopelessly vague and overbroad. Statutes impinging upon areas protected by the First Amendment must be drawn with narrowness and precision. See, e.g., *City of Houston v. Hill*, 107 S. Ct. 2502, 2508 (1987); *Kolender v. Lawson*, 461 U.S. 352 (1983); *Broadrick v. Oklahoma*, 413 U.S. 601 (1973).

The Act gives no guidance as to which representations of "the flag" are covered by its prohibitions. The Court has previously recognized the vagueness inherent in definitions of the flag. *Smith v. Goguen*, 415 U.S. at 579 and n.24. The Act's flag definition is no clearer than that in *Goguen*. It encompasses flags of any substance and any size, with the only limitation being that they must be "in a form that is commonly displayed." Some of the most commonly displayed flags are those drawn by schoolchildren in grade schools. Does the Act prohibit a child from defacing the flag she just drew? The legislative history states that many commonly displayed flags, such as flags on newspaper mastheads or superimposed on advertisements or coffee cups, are somehow *excluded* by the "commonly displayed" language. H.R. Rep. No. 101-231, *supra* at 11. The legislative history also suggests that commonly displayed flag decals would not be covered, because they are "decorative representations" of the flag. *Id.* But *all* flags, including the flags defendants burned, are "representations" of the flag, for the flag, as a symbol, only exists through its material representations. Which representations are covered and which are not is anyone's guess.

Similarly, the distinction between a soiled and an unsoiled flag, or a worn and an unworn flag, is wholly evanescent. Every flag that has been removed from its box will be "soiled" in one sense, simply by contact with human hands. Certainly any flag that has ever been exposed to the elements in Washington, DC, Seattle, Washington, or any other urban area, is soiled. Thus, on one reading the statute would proscribe only the burning of flags that have never been touched by human hands or flown in polluted air, and would not apply to the flags burned in these cases. It is impossible to determine when a flag has become sufficiently soiled or worn to permit its burning.

The Act is also substantially overbroad, for it prohibits all of the traditional means of using a flag to express opposition to it. A vast number of the acts prohibited, moreover, would have no conceivable effect on the flag's symbolic value. For example, the Act prohibits maintaining a flag on the floor of a private closet, "defacing" a flag with a veteran's medal or an adhesive peace symbol, "mutilating" a flag at a flag factory, or ceremoniously burning a flag before it is "worn or soiled." In its attempt to give the Act the appearance of neutrality, Congress expanded it to criminalize a whole range of expressive conduct that does no conceivable harm to Congress's stated symbolic interests, and rendered it unconstitutionally overbroad.⁴⁶ For similar reasons, the Court in

⁴⁶ The Act penalizes even acts by private persons in the privacy of their own homes with their own flags. See *Stanley v. Georgia*, 394 U.S. 557 (1969) (state cannot constitutionally prohibit private possession of obscenity for personal use).

Spence strongly suggested that the statute there, much narrower than this one, was substantially overbroad. *Spence*, 418 U.S. at 414 n.9.

The Act is also overbroad in its application to "any flag of the United States." Webster's *New International Dictionary of the English Language, Unabridged* 924, Plate 1 (2d ed. 1957), depicts 28 "Official Flags of the United States," including the Union Jack, the flag of the Secretary of the Interior, and the Coast Guard flag. It also depicts fifteen "Historic Flags of the United States," from the Gadsden Flag ("Don't Tread on Me"), to the Pine-Tree Flag ("An Appeal to Heaven"), to the Confederate Flag. *Id.* At a minimum, therefore, it appears that the statute forbids expressive conduct with 43 separate symbols.

Thus, the Act is unconstitutional on its face, because it is content-based, vague and overbroad.

CONCLUSION

The Court's decision in *Texas v. Johnson* provoked a "visceral" response from the President, and a political response from Congress. That is their prerogative. But the Bill of Rights is designed to provide *legal* protection from the political inclinations of the majority when they trample upon the freedoms of those whose views are in the minority. And the courts are assigned to enforce those constitutional protections. As Justice Kennedy said last term, "[t]he outcome can be laid at no door but ours." *Johnson*, 109 S. Ct. at 2548 (Kennedy, J., concurring). The outcome is again at this Court's door, because the majoritarian branches have been unwilling to protect the rights

of an outspoken minority. The decisions below should be affirmed.

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DATED: May 1, 1990

(17) (16)
Nos. 89-1433 and 89-1434

FILED
MAY 9 1990
JESSE E. SPANOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1989

UNITED STATES OF AMERICA, APPELLANT

v.

SHAWN D. EICHMAN, ET AL.

UNITED STATES OF AMERICA, APPELLANT

v.

MARK JOHN HAGGERTY, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURTS
FOR THE DISTRICT OF COLUMBIA AND THE
WESTERN DISTRICT OF WASHINGTON

REPLY BRIEF FOR THE UNITED STATES

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In our opening brief, we explained that in assessing the constitutionality of the Flag Protection Act of 1989, the Court should focus on the sort of expres-

sive conduct at issue—flag burning—and then take into account the national consensus underlying the Flag Protection Act—that physical destruction of or injury to the American flag constitutes an assault on the shared values that bind our national community. U.S. Br. 25-27. We agreed that appellees' flag burning constitutes expressive conduct, and that Congress enacted the Flag Protection Act in order broadly to protect the physical integrity of the flag and thus necessarily to encompass within its prohibition that narrow category of "symbolic speech"—expressive conduct that involves destruction of (or damage to) the American flag in order to convey any given message. U.S. Br. 28-29. Nonetheless, we explained that the First Amendment does not prohibit Congress from removing the American flag as a prop available to those who seek to express their own views by destroying it, since flag burning is a narrowly defined type of injurious expressive conduct that does not merit full protection under the First Amendment. U.S. Br. 30-41. Lastly, we submitted that, to the extent this Court in *Texas v. Johnson* accorded flag burning full First Amendment protection, that decision should be reconsidered and, upon reconsideration, appropriately limited. U.S. Br. 42-45.

Appellees and their amici, like the district courts below, principally contend that *Texas v. Johnson* essentially forecloses the constitutionality of the Flag Protection Act, and thus dismiss out of hand our defense of the statute. This approach is not faithful to the Court's language in *Johnson* itself. See 109 S. Ct. 2533, 2544 n.8 (1989) ("Our inquiry is, of course, bounded by the particular facts of this case and by the statute under which Johnson was convicted."). In any event, when appellees and their amici move beyond reflexive incantation of *Johnson*, their arguments suffer from serious flaws.

1. At the outset, several hyperbolic claims raised by appellees and their amici need to be put to rest.

a. First, our submission that the Court should defer to Congress's judgment in enacting the Flag Protection Act is in no wise an assault on *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).¹ As we made plain in our opening brief, "the Court must decide, as is its duty, whether the Act is constitutional." U.S. Br. 41. On the other hand, the importance of protecting the flag of the United States from physical attack and destruction is precisely the sort of judgment that the elected branches are well suited to make, and this Court—conversely—is not. It is this legislative judgment which should inform the constitutional analysis the Court must ultimately undertake.

b. Second, the Congressional ban on physical destruction of a flag of the United States is not tantamount to the sort of compulsion in matters of conscience the Court has condemned in such decisions as *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), and *Wooley v. Maynard*, 430 U.S. 705 (1977).² In those cases, the state laws at issue mandated that an individual act affirmatively in support of a belief he did not share. As the Court has explained:

Compelling the affirmative act of a flag salute involved a more serious infringement upon personal liberties than the passive act of carrying the state motto on a license plate, but the difference is essentially one of degree. Here, as in

¹ See, e.g., Appellees' Br. 18-19; Strong Br. 18-19; ABA Br. 17-19; People for the American Way Br. 21-22.

² See, e.g., Appellees' Br. 2, 19-20; ACLU Br. 24; Johns Br. 25.

Barnette, we are faced with a state measure which forces an individual, as part of his daily life—indeed constantly while his automobile is in public view—to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable. In doing so, the State “invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.”

Wooley v. Maynard, 430 U.S. at 715 (quoting *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. at 642).

Here, by contrast, the Flag Protection Act scarcely compels an individual either to take an “affirmative act” regarding, or to become an “instrument” for espousing, any particular view of the American flag. Cf. *Employment Division, Dep’t of Human Resources v. Smith*, No. 88-1213 (Apr. 17, 1990), slip op. 9. The Act does not compel anyone to do anything. Quite the contrary, the Act only proscribes certain specific forms of conduct and leaves entirely in place abundant opportunities for expressive conduct involving the flag, as well as full opportunities for individuals to engage in robust, wide-open, and uninhibited debate.³ In other words, the Act does not intrude upon an individual’s conscience by commanding any particular attitude or conduct toward the flag.

c. Finally, treating the act of physically destroying an American flag as expressive conduct falling outside the scope of “the freedom of speech” protected

³ Appellees’ amici criticize that statement as factually incorrect. See Association of Art Museum Directors Br. 26-27 n.16. But surely the Flag Protection Act permits an individual to use the flag in any number of ways (short of physical destruction or damage)—i.e., by violently waving it or hanging it upside down—as part of oral or written expression of his particular political or social views.

by the First Amendment does not eviscerate that constitutional guarantee.⁴ It is undisputed that the flag of the United States is the one—indeed the unique—symbol of the Nation. As this Court has intimated, see *Spence v. Washington*, 418 U.S. 405, 413-415 (1974), flag burning (or other forms of destruction or mutilation) is a physical, violent assault on the most deeply shared experiences of the American people. And it is precisely because the flag stands alone that members of the national community and their elected representatives seek to shield that symbol from physical assault and destruction.

The system of free expression ordained by the First Amendment is not at all compromised by the highly specific, narrowly tailored prohibition of certain forms of *conduct* with respect to the flag. Individuals, such as appellees, remain free to express their particular political and social views. On this record, there is no doubt that appellees did so without reprisal. See, e.g., 89-1433 J.S. App. 2a-3a; 89-1434 J.S. App. 2a, 5a & n.3; J.A. 46-67, 74-84. And, since robust political protest survives, even though, for example, an overnight sleeping demonstration may be prohibited, *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984), and a citizen may not confront a local political leader with personal epithets, *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), it is far-fetched to suggest that removing certain narrowly defined categories of expressive conduct from “the freedom of speech” imperils the liberties otherwise fully protected by the

⁴ See, e.g., Appellees’ Br. 36-40; ACLU Br. 13-14; People for the American Way Br. 22-24; Association of Art Museum Directors Br. 22-27.

First Amendment. In short, appellees are crying wolf.⁵ Just as the flag is *sui generis*, a recognition by this Court that Congress may protect the flag from destruction—yes, in the course of expressive conduct—would hardly be precedent for inroads on the First Amendment. This is particularly true given the inherently ambiguous message conveyed by the expressive conduct of flag burning. See J.A. 46-84 (broad and variegated range of messages sought to be conveyed through same conduct of burning the flag).

2. Appellees (Br. 12-16, 29-31) and their amici⁶ argue at length that the Flag Protection Act is a content-based provision that, by definition, suppresses expression, *i.e.*, politically expressive conduct involving the flag. Congress enacted the Act in order to protect the physical integrity of the flag and preserve it as “the unique and unalloyed symbol of the Nation.” S. Rep. No. 152, 101st Cong., 1st Sess. 3 (1989). As the Senate Judiciary Committee explained: “In seeking to protect its physical integrity, Congress is simply ratifying the unique status conferred upon the flag by virtue of its historic function as the emblem of this Nation.” *Ibid.* The House Judiciary Committee echoed that purpose:

[The prohibition against flag burning] recognizes the diverse and deeply held feelings of the vast majority of citizens for the flag, and reflects the government’s power to honor those sentiments through the protection of a venerated object.

⁵ See especially *People for the American Way* Br. 24 n.13 (“Sustaining this statute threatens to validate a modern version of [the Alien and Sedition] laws.”).

⁶ See, *e.g.*, *ABA* Br. 10-17; *ACLU* Br. 15-21; *Association of Art Museum Directors* Br. 7-17; *Johns* Br. 17-20; *People for the American Way* Br. 9-16.

H.R. Rep. No. 231, 101st Cong., 1st Sess. 9 (1989).

In so doing, Congress necessarily sought to encompass within the prohibition a certain type of expressive conduct, namely, physical destruction of (or damage to) an American flag. But in so crafting the statute, Congress was mindful of this Court’s historic caution in extending First Amendment protection to the act of physically destroying or mutilating the flag. Those cases, indeed, were featured prominently in the Congressional deliberations and debate with respect to this statute. And those cases were interpreted, and reasonably so, by Congress as leaving open the question of a viewpoint-neutral set of protections of the flag.

In *Street v. New York*, 394 U.S. 576, 578 (1969), Street, after learning that James Meredith had been shot, burned an American flag in protest and shouted “[w]e don’t need no damn flag * * * [i]f they let that happen to Meredith.” Street was convicted of violating a state law which made it a crime “publicly [to] mutilate, deface, defile, or defy, trample upon, or cast contempt upon either by words or act [any flag of the United States].” *Id.* at 578-579 (brackets in original). In reversing Street’s conviction, the Court examined the record meticulously and determined that he may well have been convicted for his words, as opposed to the act of flag burning itself. *Id.* at 577-579, 581-585, 588-594. Accordingly, the Court made plain that the case presented “no occasion [for the Court] to pass upon the validity of [Street’s] conviction insofar as it was sustained by the state courts on the basis that Street could be punished for his burning of the flag, even though the burning was an act of protest.” *Id.* at 594.⁷

⁷ The separate dissenting opinions of four Members of the Court left no doubt that, in their view, the government could

In *Smith v. Goguen*, 415 U.S. 566, 566-567 (1974), Goguen wore a small cloth version of an American flag sewn on the seat of his trousers and, after walking past a police officer, was charged and convicted of violating a state law which made criminally liable "[w]hoever publicly mutilates, tramples upon, defaces or treats contemptuously the flag of the United States," *id.* at 568. The Court invalidated that conviction, concluding that the statutory phrase "treats contemptuously" "fails to draw reasonably clear lines between the kinds of nonceremonial treatment that are criminal and those that are not." *Id.* at 574. The Court, accordingly, held that the state law was void for vagueness. *Id.* at 582.

Nevertheless, the Court pointed out that "[c]ertainly nothing prevents a legislature from defining with substantial specificity what constitutes forbidden treatment of United States flags." 415 U.S. at 581-582. Indeed, the Court cited the former federal flag desecration statute, 18 U.S.C. 700(a), as an example of such a provision, commenting that "[t]he

constitutionally outlaw physical destruction of the flag consistently with the First Amendment. See *Street v. New York*, 394 U.S. at 605 (Warren, C.J., dissenting) ("[T]he States and the Federal Government do have the power to protect the flag from acts of desecration and disgrace."); *id.* at 610 (Black, J., dissenting) ("It passes my belief that anything in the Federal Constitution bars a State from making the deliberate burning of the American flag an offense."); *id.* at 615 (White, J., dissenting) ("For myself, without the benefit of the majority's thinking if it were to find flag burning protected by the First Amendment, I would sustain such a conviction."); *ibid.* (Fortas, J., dissenting) ("[T]he States and the Federal Government have the power to protect the flag from acts of desecration committed in public.").

legislative history reveals a clear desire [by Congress] to reach only defined physical acts of desecration," 415 U.S. at 582 n.30, as opposed to generalized acts of "flag contempt." In his separate opinion, Justice White expressed "no doubt * * * that it is well within the powers of Congress * * * to protect the integrity of th[e] flag." *Id.* at 586 (concurring in the judgment). Justice Blackmun echoed that view, stating that "Goguen's punishment was constitutionally permissible for harming the physical integrity of the flag by wearing it affixed to the seat of his pants." *Id.* at 591 (dissenting); accord *id.* at 591-604 (Rehnquist, J., joined by Burger, C.J., dissenting).

In *Spence v. Washington*, 418 U.S. 405, 406 (1974), Spence hung an American flag upside down from his apartment window, after taping a "peace symbol" on each side. Spence was convicted of violating a so-called state "improper use" statute, which made it a crime to "[p]lace or cause to be placed any word, figure, mark, picture, design, drawing or advertisement of any nature upon any flag * * * of the United States." *Id.* at 407. The Court described in detail Spence's conduct in taking no action that would injure or destroy the flag he displayed, see *id.* at 406-409, 414-415, and expressly noted that Spence was not charged under the state's flag desecration statute for physically damaging the flag he owned, *id.* at 406, 415. Under those circumstances, the Court invalidated Spence's conviction, concluding that "no interest the State may have had in preserving the physical integrity of a privately owned flag was significantly impaired." *Id.* at 415.⁸

⁸ Justice Blackmun concurred in the result without writing an opinion. See 418 U.S. at 415. Justice Rehnquist, joined by Chief Justice Burger and Justice White, dissented, concluding

And, again, in *Texas v. Johnson, supra*, Johnson was convicted under a state statute that, as conceded by the State, “reache[d] only those severe acts of physical abuse of the flag carried out in a way likely to be offensive.” 109 S. Ct. at 2543. In declaring that provision unconstitutional, the Court, among other things, pointed out that “[t]he Texas law is thus not aimed at protecting the physical integrity of the flag in all circumstances, but is designed instead to protect it only against impairments that would cause serious offense to others.” *Ibid.*⁹

These various intimations—over many years—suggested to Congress that the Court itself envisioned *conduct* with respect to the flag as not entirely the same, for First Amendment purposes, as *speech* concerning the flag. In light of all these cases, Congress carefully crafted the Flag Protection Act to comply with this Court’s prior expressions regarding the First Amendment’s application to provisions outlawing certain conduct—the physical destruction of or damage to the flag itself—as opposed to otherwise protected speech incident to such conduct. In so doing, Congress’s actions, as appellees and amici correctly pointed out, cannot be wholly divorced from the type of expressive conduct prohibited. But Congress plainly viewed the regulation of *conduct* as not outside the range of its powers consistent with the

that the Constitution permitted the government to “withdraw[] a unique national symbol from the roster of materials that may be used as a background for communications.” *Id.* at 423.

⁹ In the accompanying footnote, the Court specifically referred to Justice Blackmun’s dissenting opinion in *Smith v. Goguen*, 415 U.S. at 590-591. See *Texas v. Johnson*, 109 S. Ct. at 2543 n.6.

First Amendment. At the same time, Congress did not seek to suppress any particular political or moral viewpoints associated with such physical activity; nor did Congress “punish criticism of the flag, or the principles for which it stands.” *Spence v. Washington*, 418 U.S. at 422 (Rehnquist, J., dissenting).¹⁰ In

¹⁰ The courts below acknowledged that the Flag Protection Act, by its terms, makes criminally liable those persons who, without regard to the content of their expression, physically damage or mistreat a flag of the United States. See 89-1433 J.S. App. 13a; 89-1434 J.S. App. 10a. The Act, drafted by Congress to preclude a circumscribed type of conduct—physically damaging a flag of the United States—ensures that only such conduct, and not any protected speech associated with it, will be prosecuted. And on this record, appellees can advance no colorable claim that the government filed criminal charges based on any speech or expressive conduct other than their particular flag burning activities. Contrast *Street v. New York*, 394 U.S. at 577-579, 581-585, 588-594.

Nevertheless, appellees (Br. 33-35) and amici (see, e.g., ACLU Br. 17; Johns Br. 19-20) claim that the statute’s proscription against defilement, and express exception for disposal of a worn or soiled flag, render the statute impermissibly viewpoint-based. That claim is mistaken. First, the act of physical defilement is not the functional equivalent of an act of disrespect or dishonor. Congress has prohibited destroying or damaging a flag of the United States; it has assuredly not prohibited showing disrespect for the flag. Cf. 36 U.S.C. 176 (recommended treatment of flags). Second, the statutory exception merely recognizes a traditional and customary means of flag disposal. See 36 U.S.C. 176(k). In any event, as the House Report explained:

As flags are ordinarily made of materials that wear out with prolonged, proper use, a strict prohibition against their destruction would require the maintenance of all flags in perpetuity.

H.R. Rep. No. 231, *supra*, at 10. Appellees and their amici make much of the statutory exception for flag disposal, but it would be a curious Constitution that would permit a ban on flag burning in the absence of such an exception, but not with one.

many respects, therefore, one contributing justification for the Flag Protection Act is Congress's aim in eliminating a substantial "secondary effect" of flag burning—what Congress aptly described a generation ago as "an injury on the entire Nation," S. Rep. No. 1287, 90th Cong., 1st Sess. [*sic*; 2d] 3 (1968). Cf. *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 49 (1986). This Congressional purpose underlying the Flag Protection Act—addressed only at conduct—is thus quite distinct from censorship of any particular political viewpoint or compulsion of any particular attitude toward the flag or the values for which it stands.

3. Appellees (Br. 41-42) and amici (see, *e.g.*, Johns Br. 5-14) contend that the Flag Protection Act's definition of a "flag of the United States"—"any flag of the United States, or any part thereof, made of any substance, of any size, in a form that is commonly displayed," 18 U.S.C. 700(b) (as amended)—is unconstitutionally vague. On this record, it is undisputed that appellees burned flags of the United States falling under that statutory definition. See U.S. Br. 14-17. Appellees had no doubt that they were violating this Act—that was the very purpose of their self-styled "challeng[e]" to the statute and "Festival of Defiance." See J.A. 55, 79. For that reason, appellees' facial challenge must fail, since "[o]ne to whose conduct a statute clearly applies may not successfully challenge it for vagueness." *Parker v. Levy*, 417 U.S. 733, 756 (1974).

Moreover, as this Court has explained, the void-for-vagueness doctrine requires that a statute be drafted in "terms that the ordinary person exercising ordinary common sense can sufficiently under-

stand and comply with." *United States Civil Service Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 579 (1973); see *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). The Flag Protection Act's definition of a flag measures up to that standard. The definition's operative term—"in a form that is commonly displayed"—shows that Congress did not extend protection to representations of flags, such as those found in decals and drawings, compare 18 U.S.C. 700(b) (1988),¹¹ but only to those sorts of ensigns or banners that are capable of being used as a flag in the colloquial sense, *i.e.*, displayed from a staff, draped over an object, or suspended from points above the ground. See generally 36 U.S.C. 175 (customary methods of displaying a flag of the United States). And the legislative record confirms such a "common sense" construction of the statute. See, *e.g.*, H.R. Rep. No. 231, *supra*, at 11.

Finally, appellees (Br. 43) and amici (Johns Br. 9-10) mistakenly claim that the Flag Protection Act covers any number of official or historic American flags. To the contrary, the statute's reference to "flag of the United States" necessarily incorporates the established—and well understood—definition of the flag, *i.e.*, "thirteen horizontal stripes, alternate red and white; and * * * [50] stars, white in a blue field." 4 U.S.C. 1; see 4 U.S.C. 2 (star added to union of flag on admission of a new State into the Union). That is the unique symbol of the Nation that Congress quite properly chose to protect from physical attack or mishandling.

¹¹ Former Section 700(b) expressly applied to "a picture or a representation" of an American flag.

For the foregoing reasons, and those stated in our opening brief, the judgment of the district court in *United States v. Eichman*, No. 89-1433, and the judgment of the district court in *United States v. Haggerty*, No. 89-1434, should be reversed.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

MAY 1990

(6) (5)
Nos. 89-1433, 89-1434

Supreme Court
FILED

APR 17 1990

JOSEPH F. SPANIOLO, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1989

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v.

SHAWN D. EICHMAN, *et al*

UNITED STATES OF AMERICA,

Appellant,

v.

MARK JOHN HAGGERTY, *et al*

ON APPEALS FROM THE UNITED STATES DISTRICT COURTS FOR
THE DISTRICT OF COLUMBIA AND THE WESTERN DISTRICT OF
WASHINGTON

***Amicus Brief of Governor Mario M. Cuomo in Support
of Appellant***

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Nos. 89-1433, 89-1434

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OCTOBER TERM, 1989.

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FOR THE DISTRICT OF COLUMBIA AND THE WESTERN
DISTRICT OF WASHINGTON

***Amicus Brief of Governor Mario M. Cuomo in Support
of Appellant***

Statement of Interest

The Governor of the State of New York, Mario M. Cuomo, submits this brief in support of the position taken by Appellant, the United States of America, that the Flag Protection Act ("Act") does not violate the first amendment. The Governor has a strong and direct interest in this litigation. He has submitted to the New York Legislature a Governor's Program Bill that is substantially identical to the Act. Prior to the development of the Act by Congress, the Governor submitted a predecessor Program Bill that advanced the approach of a content-neutral, unconditional rule of protection that Congress has now adopted. The original Program Bill was conformed to the Act in order to promote consistency in State and Federal enforcement.

The Governor's Program Bill will not be considered by the Legislature unless the constitutionality of the Act is sustained. The Governor is eager to see his proposal considered and enacted. As governor of perhaps the most diverse state in the nation, *amicus* has a strong appreciation for the power of the flag as a symbol of our national unity. He believes that a prohibition on intentional destruction of the American flag is needed to preserve the flag as a symbol of national unity and is reasonable in light of the unique place the flag holds in our history and traditions and the minimal impact of the prohibition on the opportunity for expression.

For these reasons, the Governor believes it is desirable to protect the physical integrity of the flag if that can be done consistent with the first amendment. Based on the legal

argument set forth in this brief, the Governor respectfully submits that the Act achieves that objective.¹

Summary of Argument

The Act has been crafted to cure the specific constitutional defect this Court found in the Texas statute considered in *Texas v. Johnson*, 109 S.Ct. 2533 (1989). It protects the physical integrity of the flag regardless of whether any communication that gives offense is involved. Because the Act, unlike the Texas statute, does not require proof that the destruction of the flag of the United States would offend, this Court should scrutinize anew the governmental interests that support protecting the physical integrity of the flag and review whether the pursuit of those interests in the Act abridges freedom of speech.

The standard for that scrutiny is set forth in *United States v. O'Brien*, 391 U.S. 367 (1968). To be sustained, the Act must advance an important or substantial governmental interest. That interest must be unrelated to the suppression of expression and any incidental impact that the Act has on expression must be no greater than necessary to achieve the legitimate objective. All these requirements are met here.

¹In addition, if the Act is struck down, there will be a serious and profound impact on New York and other states because such a ruling would almost certainly trigger a divisive battle in Congress and in the States over whether a constitutional amendment to permit a ban on flag burning should be passed. Of course, this Court should not let its ruling be based on projected political reactions. Yet, if this Court finds that the Act is unconstitutional, but has a curable defect, *amicus* urges this Court to be clear in its ruling so that governors, members of Congress and state legislatures, and citizens of this nation are not left with the false impression that the only means to protect the American Flag is to amend the first amendment for the first time in our nation's nearly 214-year history.

ARGUMENT

I. The Act Cures the Specific Constitutional Defects Identified in *Texas v. Johnson*.

In *Texas v. Johnson*, 109 S.Ct. 2533 (1989), this Court struck down a provision of Texas state law forbidding the “desecration” of an American flag “in a way that the actor knows will seriously offend one or more persons likely to observe or discover the action.”² This Court refused to sustain the Texas law under the *O’Brien* test because it found that Texas’s asserted governmental interest was related to the suppression of free expression. This Court based this determination on the fact that enforcement of the law was conditioned on an act of flag destruction having a communicative aspect.³ Having found the Texas statute to be a content-based restriction of political speech, this Court subjected Texas’s asserted interest to “‘the most exacting scrutiny.’ [citations omitted]” 109 S.Ct. at 2543, and found it insufficient to override the identified free speech interest.

The Act avoids the constitutional defects this Court found in the Texas statute by banning all physical assaults on the flag regardless of whether any communication is involved.⁴ The Act would apply equally to a flag burning that was done in private and designed not to convey any message at all. Thus, because the Act, unlike the Texas statute, is not dependent on any communicative message, it is appropriate for the Court to take a fresh look at the

²Tex. Penal code (1989), §§ 42.09(a)(3); 42.09(b).

³“[Johnson] was prosecuted for his expression of dissatisfaction with policies of this country, expression situated at the core of our First Amendment values. . . . Moreover, Johnson was prosecuted *because* he knew that his politically charged expression would cause ‘serious offense.’” 105 S.Ct. 358 (emphasis added).

⁴Flag Protection Act of 1989, Pub.L. No.101-131, 103 Stat. 777; 18 U.S.C. 700(a)(1).

asserted governmental interests a state or Congress could have for enacting such a content-neutral flag protection law and to consider whether this prohibition meets the three part *O’Brien* test described above.

II. The Act Satisfies the *O’Brien* Test.

A. The Governmental Interest in Protecting a Unique Symbol of National Unity is Important and Substantial.

Government frequently passes laws and uses official time and resources to establish symbols and ceremonies that express our patriotism and national unity. The Washington monument is maintained on federal property to express the pride we feel in our great Revolutionary War commander and first President. The Lincoln memorial expresses our values of national unity and freedom for all people regardless of the color of their skin. The Bicentennial celebrations of our independence, of our Constitution, and of our Bill of Rights, as well as our Memorial Day and Fourth of July ceremonies are only a few more examples of the varied and diverse ways in which government acts to promote symbols and ceremonies because of the patriotic and unifying national values they express.

While all these activities are important, the government’s interest in establishing and promoting the flag as a symbol of national unity is particularly substantial. The flag is unique—the dominant symbol of our national identity and national unity. Only the flag flies every day in every major public office and major public forum in every corner of our nation. Our most basic patriotic ceremony is to pledge allegiance to the flag and to the Republic for which it stands. The flag marks our greatest national achievements as when it was placed on the moon by our astronauts. It is the flag that drapes the coffins of fallen Americans who

served us, whether they be a fallen President slain by an assassin's bullet or an ordinary soldier who died fighting for his or her country.

These facts establish that government has acted to create and promote the flag as the unique national symbol. Government's interest in doing so is not only substantial, it is fundamental. The establishment and promotion of this symbol creates of course an emblem of nationhood. As the unique national symbol, it is a key means of encouraging concern for the country and the common good of all the people. We submit that the "substantial and important" part of the *O'Brien* test is plainly met.

B. The Governmental Interests Advanced in the Act Are Not Related to Suppression of Expression.

The "unrelated to suppression of expression" prong of the *O'Brien* test is also clearly met. The government's interest in protecting the American flag because of its importance as a unique and unifying national symbol is not dependent on whether those who might burn or mutilate it do so as a means to deplore lack of popular support for the military, protest appealing foreign policies or merely to make a nihilistic statement. When Congress, or a state like New York, passes a content-neutral law protecting the flag, government is explicitly expressing that it has an interest in preserving the flag regardless of whether those who would threaten its physical integrity do so out of agreement or disagreement with any idea. There is no reason for this Court to conclude that this law is in any way aimed at dissent or at a particular view or at any particular content of expression.

Nor is destroying the flag inherently anti-government and the prohibition on its destruction inherently pro-government. Destroying the flag can equally be intended to

deplore lack of popular support for governmental policies. Indeed that seems to have been the case with the flag burning at issue in *Street v. New York*, 394 U.S. 576 (1969). In the words of Thomas Jefferson, this is not a law designed "to silence by force and not by reason the complaints or criticisms, just or unjust, of our citizens against the conduct of their agents."⁵ Rather it is a law whose restrictions on expressive conduct are incidental to a wholly legitimate and proper governmental purpose.

C. The Incidental Interference of the Act with Expression is Minimal and No Greater than Necessary.

The third prong of the *O'Brien* test—that the restriction be no greater than necessary—is easily met here not only because the Statute is targeted to protecting a unique national symbol but also because any incidental restriction on expression is truly minimal. The Act will not discourage vigorous dissent or silence any speaker or message. Thus, even though it may have the incidental impact of limiting one very specific mode of expression, the law cannot be viewed as having a significant effect on expression generally and no impact whatsoever on restricting dissent.

First, it is important to note that the Flag Protection Act does not prohibit the effective communication of any particular idea or message. Burning the flag, at most, is conduct that expresses a vague general disagreement with something associated with the United States. To the extent that a flag burning communicates a particular message, it is the surrounding speech that does so. All of the words, posters, handbills and publicity that give a "flag burning event" some communicative meaning are still entirely protected. There is no danger that the Act would affect speech

⁵T. Jefferson, *Writings* 1057 (M. Peterson ed. 1984).

and expressive conduct that are essential for vigorous protest and dissent.⁶

Second, and closely related, the Act does not deny any group a means of communication—such as marching—that has historically been used as a visible means for mass protest.

Third, the Act in no way closes off avenues of expression that are vital to the practical ability of some types of speakers to communicate. At times this Court has overturned laws or ordinances designed to promote legitimate governmental interests because such laws would impact too harshly on the ability of some groups to engage in meaningful expression. Thus, this Court has struck down bans on door-to-door solicitation or handbill distribution because of the importance such avenues of expression hold for those who are poor or who seek to deliver their religious message door-to-door and town-by-town. *Murdock v. Pennsylvania*, 319 U.S. 105 (1943); *Schneider v. State of New Jersey*, 308 U.S. 147 (1939). The Act would have no such impact on any such identifiable group of speakers.

Fourth, the Act in no way closes off any of the identified types of public forums this Court has recognized historically as deserving of special protection. *Cornelius v. NAACP Legal Defense Fund*, 473 U.S. 788, 802 (1985).

⁶ In fact, although burning a draft card, standing alone, is a far clearer communicative statement about opposing the draft than is burning the flag about any specific message, this Court had little problem in finding that the impact of restrictions on that form of expressive conduct did not outweigh the asserted governmental interest. *United States v. O'Brien*, 391 U.S. 367 (1968). And while the availability of alternative methods of speech cannot standing alone justify a restriction on expressive conduct, *Spence v. Washington*, 418 U.S. 405, 411 n.4 (1974), this Court has often recognized that this is a legitimate consideration when balancing governmental and free speech interests. *Frisby v. Schultz*, 108 S.Ct. 2495 (1988).

Fifth, promotion of a symbol of national unity does not constitute the imposition by the government of a preferred or orthodox view of how citizens must think or feel. When we honor what America stands for, we honor our rights to speak freely, to take unpopular positions and to disagree vigorously with our government. Indeed, Americans often exhibit their patriotism by encouraging government to change their policies to ones more consistent with their view of American values.

Finally, it is important to note that the Act in no way compels any person to engage in any speech offensive to his or her religious or personal views or to in any way “be an instrument for fostering public adherence to an ideological point of view he finds unacceptable.” *Wooley v. Maynard*, 430 U.S. 705, 713-716 (1977); *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 633-34 (1943).

Any incidental impairment on expressive conduct that the Act may cause is unavoidable if government is to make an effort with broad-based credibility to ensure that the flag fulfills its role as a unique symbol of national unity. To serve this unique symbolic role, the flag must be a protected symbol, set apart and placed above the fray. To function as a symbol of national unity the flag must be allowed to be meaningful in different ways for different people. It must be an object that no one group can claim as its own to cherish or destroy. An unconditional rule of protection is the most reasonable way to achieve this objective.

Indeed, this is the fundamental teaching of *Texas v. Johnson*. There the prohibition against destroying the flag was directed only at those whose action would give offense to the community. That is not a proper approach in a country that values and protects strong dissent. In contrast, the unconditional rule of protection embodied in the Act is neutral with regard to all groups.

The Act is thus narrowly drawn to promote Congress' substantial and non-suppressive interest in preserving the physical integrity of the flag in all contexts. In light of the unique symbolic role the flag plays in expressing our patriotism and national unity, this Court should find that the governmental interest in protecting its physical integrity is sufficient to justify any incidental impact the Act may have on expressive conduct.

CONCLUSION.

For the foregoing reasons, the judgment of the United States District Court for the District of Columbia and the judgment of the United State District Court for the Western District of Washington should be reversed.

Respectfully submitted,

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7 b
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On Appeal From The United States District Court
For The Western District of Washington

**BRIEF OF
SOUTHEASTERN LEGAL FOUNDATION, INC.
AS AMICUS CURIAE
IN SUPPORT OF APPELLANT**

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April, 1990

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On Appeal From
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INTEREST OF AMICUS

The Southeastern Legal Foundation, Inc. ("Southeastern") submits its brief *amicus curiae* in this case. The parties have consented to the filing of this brief and their consent letters have been filed with the Clerk of this Court.

Southeastern is a non-profit corporation organized in 1976 for the purpose of advancing public interest viewpoints in adversarial proceedings involving significant issues. Dedicated to economic and social progress through the equitable administration of law, Southeastern presents the views of its supporters who believe the rights of all persons should be properly protected and balanced in the courts. Toward that end, Southeastern has participated as *amicus curiae* in a number of cases before this Court, including *Common Cause v. Schmitt*, 455 U.S. 129 (1982); *Federal Energy Regulatory Commission v. Mississippi*, 456 U.S. 742 (1982); *South Florida Chapter of the AGC of America, Inc. v. Metropolitan Dade County, Florida*, 723 F.2d 846 (11th Cir. 1984), *cert. denied* 469 U.S. 871 (1984); *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986); and *City of Richmond v. J.A. Croson Co.*, ____ U.S. ____, 109 S.Ct.706 (1989). Additionally, Southeastern has recently submitted its *amicus curiae* brief in *Astroline Communications Company Limited Partnership v. Shurberg Broadcasting of Hartford, Inc.*, Case No. 89-700, which is pending before the Court.

As proponents of the right to expression granted to all citizens by the Constitution, Southeastern recognizes that a tension exists between the First Amendment and any statutes restricting communicative activity. However, Southeastern and its supporters believe that the protection afforded our nation's flag by the Flag Protection Act of 1989, Pub. L. No. 101-131, Sections 1-3, 103 Stat. 777, is constitutional because it is content neutral.

Southeastern recognizes that only by ensuring that the freedoms cherished by all Americans are exercised in an orderly manner can we defend against abuses of these rights. In its brief, Southeastern argues that the Flag Protection Act of 1989 is constitutional and does not restrict Appellees' freedom of speech in any impermissible manner.

STATEMENT OF THE CASE

Southeastern adopts the statement of the case contained in the brief on behalf of Appellant United States of America.

SUMMARY OF ARGUMENT

The American flag is unique among all national symbols and must be protected. It is the single physical embodiment of our nation and its people which is universally recognized.

When both the House and Senate were considering legislation to protect the American flag from desecration they were very cognizant of this Court's recent decision in *Texas v. Johnson*. In order to guard against a successful constitutional challenge to the statute, Congress made the statute content - neutral. Violations of the Flag Protection Act of 1989 do not depend on the communicative impact of the conduct.

Freedom of expression has never been absolute under the Constitution. This Court has recognized many exceptions to absolute First

Amendment protection to various forms of expression. Burning the American flag falls within two recognized exceptions to First Amendment protection: obscenity and "fighting" words.

ARGUMENT

I.

THE AMERICAN FLAG IS A UNIQUE SYMBOL OF FREEDOM

Paradoxically, this Nation's banner, a unique and universally recognized symbol of freedom to people all over the world, may be desecrated by individuals who flaunt their hatred for our country and the freedoms we all cherish. Chief Justice Rehnquist, in his dissent in *Texas v. Johnson*, ___ U.S. ___, 109 S.Ct. 2533, 2552 (1989), recognized this uniqueness:

The American flag, then, throughout more than 200 years of our history, has come to be the visible symbol embodying our Nation. It does not represent the views of any particular political party, and it does not represent any particular political philosophy. The flag is not simply another "idea" or "point of view" competing for recognition in a marketplace of ideas.

Our flag is the physical embodiment of our country and its people in all of our diversity. It

is a symbol of a people and a nation. It belongs to every citizen of this country, and each of us has a direct interest in preserving this symbol of freedom.

Henry Ward Beecher wrote, "[a] thoughtful mind, when it sees a nation's flag, sees not *the flag* only, but the nation itself; and whatever may be its symbols, its insignia, he reads chiefly in the flag the government, the principles, the truths, the history which *belongs to the nation* that sets it forth." (emphasis added.)

The American flag is a unique symbol of our nation. No other object or insignia so completely represents our country and its people. Because of the flag's singular status among all symbols of the United States it deserves to be treated with honor and respect. The Flag Protection Act of 1989 guarantees that the symbol of our nation is protected from vandalism and desecration.

II.

CONGRESS PASSED THE FLAG PROTECTION ACT OF 1989 TO PROTECT THE PHYSICAL INTEGRITY OF THE AMERICAN FLAG, AND NOT TO SUPPRESS FREE EXPRESSION

After this Court's decision in *Texas v. Johnson*, *supra*, Congress took specific and deliberative action to protect the integrity of the American flag. Several proposals were offered, and the Judiciary Committees of both the House

and Senate conducted extensive hearings with respect to the appropriate means of preserving a prohibition against flag burning. Both committees were consciously concerned about the statute's being consistent with the Court's holding in *Texas v. Johnson*. See, S. Rep. No. 152 at 10; and H.R. Rep. No. 231, at p. 2.

The Senate Committee's report addressed the potential problem of a conflict with *Texas v. Johnson*. In its report, the Committee recognized:

[U]nlike the law struck down in *Texas v. Johnson* - which was content-based - S. 1338 is content neutral. Unlike the law struck down in *Texas v. Johnson*, whether one's treatment of the flag violates the amended Federal law would not depend on the likely communicative impact of the conduct. And unlike the law struck down in *Texas v. Johnson*, the amended Federal law is in fact "aimed at protecting the physical integrity of the flag in all circumstances."

S. Rep. No. 152, at 10.

The House Committee Report also was cognizant that its bill would face a constitutional challenge, and it was carefully considered and drafted in light of *Texas v. Johnson*. The House Report stated:

The bill responds to [that] decision... by amending the current Federal flag statute to make it content neutral: that is, the amended statute focuses exclusively on the conduct of the actor, irrespective of any expressive message he or she

might be intending to convey. The bill serves the national interest in protecting the physical integrity of all American flags in all circumstances. This interest is "unrelated to the suppression of free expression." *U.S. v. O'Brien*, 391 U.S. 367, 377 (1968). H.R. Rep. No. 231, at 2.

The careful attention given to the Flag Protection Act by both houses of Congress in order to avoid constitutional pitfalls is apparent. Throughout the entire deliberative and drafting process both the House and Senate Judiciary Committees realized their bills would face a constitutional challenge.

The majority opinion in *Texas v. Johnson* also clearly recognized--as do many prior decisions of this Court--that there is authority for governmental regulation of treatment of the United States Flag. Rejecting the argument that there was no such state interest, the Court pointed to Congress' enactment of "precatory regulations" for treatment of the flag and stated flatly that "we cast no doubt on the legitimacy of its interest in making such recommendations." 109 S. Ct. at 2547.

Although the challenged statute here goes beyond "precatory regulations," it is clearly an attempt by Congress to utilize its authority to the fullest extent possible to protect the American flag from unlawful abuse.

Moreover, it is clear from earlier decisions of this Court that until *Johnson*, there was an assumption that the government -- especially the Congress--could criminalize certain types of con-

duct aimed at the flag. See *Texas v. Johnson*, 109 S.Ct. 2533, 2554-55 (dissenting opinion of Justices Rehnquist, White and O'Connor.) As stated in a dissenting opinion by Justice Hugo Black, a keen student of the First Amendment, in *Street v. New York*, 394 U.S. 576, 89 S.Ct. 1354 (1969), "[i]t passes my belief that anything in the Federal Constitution bars the State from making the deliberate burning of the American Flag an offense." 89 S.Ct. at 1374. Similar views were expressed by Chief Justice Warren and Justice Fortas, in dissenting from the Court's decision in *Street*. *Id.* at 1367-77.

In view of these previously expressed views of members of the Court, it is not surprising that the reaction to this Court's decision in *Texas v. Johnson* was one of astonishment. Nor is it surprising that Congress, while considering the possibility and the necessity of a constitutional amendment, chose the less intrusive means available to it, enactment of a new statute, as a response to the Court's decision in *Texas v. Johnson*.

Congress has vast authority to enact criminal statutes for the protection of our national interest. For example, in the wake of violence directed at national officers, Congress enacted special legislation to protect the President and others in the order of succession, even though the prescribed conduct in question would also violate state law. 18 U.S.C.A. § 1751. Congressional authority to protect the flag and other national symbols has often been recognized by this Court. See e.g., *Smith v. Goguen*, 415 U.S. 566, 95 S. Ct. 1242, 1253 -1254 (1974) (con-

curring opinion by Justice White, stating Congress had power to "adopt and prescribe a national flag and to protect the integrity of that flag," along with its other powers.)

Sub judice this legislation is consistent with the longstanding view of Congress's authority to protect our institutions of government.

III.

THE CONDUCT PROHIBITED BY THIS STATUTE SHOULD BE HELD TO FALL WITHIN THE EXCEPTIONS TO COMPLETE FIRST AMENDMENT PROTECTION

Burning the American flag is a form of political obscenity. Put another way, in the words of Justice Rehnquist's dissenting opinion in *Texas v. Johnson*, flag burning is "the equivalent of an inarticulate grunt or roar that, it seems fair to say, is most likely to be indulged in not to express any particular idea, but to antagonize others." 109 S.Ct. at 2553. As such, it falls into the category of unprotected classes of speech.

Freedom of expression is not, and never has been under our Constitution, absolute. Under the Constitution this Court has recognized many exceptions to absolute First Amendment protection to various forms of expression. In *Chaplinsky v. New Hampshire*, 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1031 (1942), a unanimous Court said:

"Allowing the broadest scope to the lan-

guage and purpose of the Fourteenth Amendment, it is well understood that *the right of free speech is not absolute at all times and under all circumstances.*

There are certain well defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem. These include the loud and obscene, the profane, the libelous, and the insulting or "fighting" words - those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Id.*, at 571-572, 62 S.Ct. at 769 (Footnotes omitted) (Emphasis added).

The burning of the American Flag falls under two of the recognized exceptions to complete First Amendment protection: obscenity and "fighting" words.

Burning our Nation's ensign is an obscenity to all citizens of this country. It is an act without any redeeming social value and it is an act which is designed and almost certain to incite violence.

The lower courts emphasized that the two flag burning incidents involved in the *Haggerty* and *Eichman* cases did not lead to any fighting or other public disturbance ending in destruction

or violence. Rather than concluding that flag burning does not lead to violence, as the two district courts have done, these two incidents should be seen as fortunate outcomes to very explosive situations. If the two flag burning incidents involved in this appeal had resulted in physical brawling between the flag desecrators and outraged citizens, would the lower court's holdings have been different? *Amicus* submits that the two lower court orders leave that possibility open.

CONCLUSION

Amicus respectfully requests that this Court reverse the judgments of the district courts, and uphold the constitutionality of the statute.

Respectfully submitted,

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APRIL 1990

8 7
Nos. 89-1433 and 89-1434

Supreme Court, U.S.
FILED

APR 18 1990

JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1989

UNITED STATES OF AMERICA, APPELLANT

v.

SHAWN D. EICHMAN, ET AL., APPELLEES

UNITED STATES OF AMERICA, APPELLANT

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MARK J. HAGGERTY, ET AL., APPELLEES

On Appeals from the United States District Court for the
District of Columbia and the United States District Court
for the Western District of Washington

BRIEF FOR SENATOR JOSEPH R. BIDEN, JR.,
AS AMICUS CURIAE IN SUPPORT OF REVERSAL

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QUESTION PRESENTED

Whether the First Amendment prohibits the United States from prosecuting appellees for knowingly burning a flag of the United States, in violation of 18 U.S.C. § 700, as amended by the Flag Protection Act of 1989, Pub. L. No. 101-131, § 2(a), 103 Stat. 777.

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INTEREST OF THE AMICUS CURIAE

This case concerns the constitutionality of the Flag Protection Act of 1989, Pub. L. No. 101-131, 103 Stat. 777. As Chairman of the Senate Judiciary Committee, amicus curiae Senator Joseph R. Biden, Jr. played a major role in the drafting and passage of that statute. Based on the proceedings before his Committee, Senator Biden concluded that content-neutral legislation protecting the integrity of the American flag would serve an important governmental purpose and would not be invalid under the First Amendment. Senator Biden thus

has a strong interest in presenting his views to the Court in defense of the constitutionality of the Act.

STATEMENT

1. On June 21, 1989, this Court, by a vote of 5-4, held unconstitutional a Texas statute that prohibited any person from intentionally or knowingly defacing, damaging, or otherwise physically mistreating a state or national flag "in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action." Tex. Penal Code Ann. § 42.09(b) (1989). *Texas v. Johnson*, 109 S. Ct. 2533 (1989). Writing for the majority, Justice Brennan stated that, "[i]f there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Id.* at 2544. The Texas statute violated this principle because it was "not aimed at protecting the physical integrity of the flag in all circumstances, but [was] designed instead to protect it only against impairments that would cause serious offense to others." *Id.* at 2543. Thus, "[w]hether Johnson's treatment of the flag violated Texas law * * * depended on the likely communicative impact of his expressive conduct." *Ibid.* In sum, "Johnson's political expression was restricted because of the content of the message he conveyed." *Ibid.*

In striking down the Texas law, the Court emphasized that its decision was "bounded by the particular facts of this case and by the statute under which Johnson was convicted." *Johnson*, 109 S. Ct. at 2544 n.8. Specifically, the Court did not dispute that "there is a special place reserved for the flag in this Nation, and thus we do not doubt that the Government has a legitimate interest in making efforts to 'preserv[e] the national flag as an unalloyed symbol of our country.'" *Id.* at 2547 (quoting *Spence v. Washington*, 418 U.S. 405, 412 (1974)). Nor did the Court suggest that a statute would be invalid if it were "aimed at protecting the physical integrity of

the flag in all circumstances." *Id.* at 2543 & n.6 (citing *Smith v. Goguen*, 415 U.S. 566, 590-591 (1974) (Blackmun, J., dissenting)). But "[t]o say that the Government has an interest in encouraging proper treatment of the flag * * * is not to say that it may criminally punish a person for burning a flag as a means of political protest." *Johnson*, 109 S. Ct. at 2547.

2. For nearly 200 years, Congress has passed laws relating to the design, treatment, and integrity of the American flag. See, e.g., Act of January 13, 1794, ch. 1, 1 Stat. 341; Act of April 4, 1818, ch. 34, 3 Stat. 415. In 1968, concerned that federal law, unlike the laws of most states, did not prohibit the physical destruction of the flag, Congress adopted a flag protection law. The federal statute made it a crime "knowingly [to] cast[] contempt upon any flag of the United States by publicly mutilating, defacing, defiling, burning, or trampling upon it." 18 U.S.C. § 700(a) (1982). The Senate Report urged passage of this legislation on the ground that "[p]ublic burning, destruction, and dishonor of the national emblem inflicts an injury on the entire Nation. Its prohibition imposes no substantial burden on anyone." S. Rep. No. 1287, 90th Cong., 2d Sess. 2 (1968); see also H.R. Rep. No. 350, 90th Cong., 1st Sess. 1 (1967).

This Court's decision in *Johnson* called into question the constitutionality of the federal flag protection statute. Accordingly, within days of the decision, numerous proposals were introduced in the Senate and House of Representatives either to amend the federal statute or to amend the Constitution. See S. Rep. No. 152, 101st Cong., 1st Sess. 6 (1989); H.R. Rep. No. 231, 101st Cong., 1st Sess. 2 (1989).

During the next several months, the Senate Judiciary Committee received extensive testimony with respect to the appropriate means of protecting the integrity of the American flag. See *Hearings on Measures to Protect the Physical Integrity of the American Flag: Hearings on S. 1338, H.R. 2978, and S.J. Res. 180 Before the Senate*

Comm. on the Judiciary, 101st Cong., 1st Sess. (1989) [hereinafter *Senate Hearings*]. The Committee heard "testimony from a broad range of constitutional scholars, constitutional historians, representatives of veterans' groups and individual veterans, as well as from" Members of Congress and from the Department of Justice. S. Rep. No. 152, *supra*, at 6. These witnesses convinced the Committee that, as Dean Geoffrey R. Stone remarked, "[t]he Court did not hold [in *Johnson*] that there is an inviolable First Amendment right to burn the American flag" (*Senate Hearings* 192) and that it was possible to draft a flag protection statute that would satisfy constitutional standards.

The Senate Report explained that "the existing Federal statute, 18 U.S.C. 700, does not make it a crime to burn or destroy the flag. Rather, the current law makes it a crime for anyone to 'knowingly cast[] contempt' upon a flag of the United States by 'publicly mutilating, defacing, defiling, burning or trampling upon' it." S. Rep. No. 152, *supra*, at 9. Therefore, "the fatal flaw in the Texas statute as well as in the existing Federal statute is that the commission of the crime is inextricably linked to the communication of an idea. Under Texas law, the gravamen of the violation was 'serious offense;' under current Federal law, the gravamen of the violation is 'cast[ing] contempt.' Both laws are content-based, both would be subject to 'the most exacting scrutiny' by the Court and both conflict with the first amendment." *Id.* at 9-10.

S. 1338, the Senate bill, sought to remedy this defect by deleting the requirements in Section 700 that the actor have "cast contempt upon" the flag or have acted "publicly." As the Senate Report noted:

Prosecution under the amended law would not in any way depend on the reaction of observers to the conduct. Put simply, commission of the crime would not be linked to the communication of any idea—indeed, the statute would apply regardless of whether the actor intends to communicate an idea.

Operation of S. 1338, therefore, does not depend on whether a flag is being burned or otherwise destroyed for communicative or non-communicative purposes, or upon whether any particular person or persons might applaud or oppose the actor's conduct.

S. Rep. No. 152, *supra*, at 10 (quoting *Texas v. Johnson*, 109 S. Ct. at 2543).

The House bill, H.R. 2978, differed from the Senate bill only in minor respects. Like S. 1338, the House bill was intended to "respond[] to the Supreme Court decision in *Texas v. Johnson* by amending the current Federal flag statute to make it content-neutral: that is, the amended statute focuses exclusively on the conduct of the actor, irrespective of any expressive message he or she might be intending to convey." H.R. Rep. No. 231, *supra*, at 2. By "delet[ing] the language 'casts contempt upon' and the words 'publicly' and 'defiling,'" H.R. 2978 was designed to amend Section 700 "to protect the physical integrity of American flags in all circumstances, regardless of the motive or political message of any flag burner." *Id.* at 8. Thus, "any conduct resulting in physical harm or damage to the flag, regardless of the actor's intent, is prohibited." *Ibid.*

On September 12, 1989, the House passed H.R. 2978 by a vote of 380 to 38. See 135 Cong. Rec. H5562 (daily ed. Sept. 12, 1989). The Senate thereupon proceeded to consider the House bill, as opposed to S. 1338, and passed it by a vote of 91 to 9, after adding two amendments. See 135 Cong. Rec. S12655 (daily ed. Oct. 5, 1989). The amended bill was then returned to the House, where it again received overwhelming approval, by a vote of 371 to 43. See 135 Cong. Rec. H6697 (daily ed. Oct. 12, 1989). H.R. 2978 became law on October 28, 1989, as the Flag Protection Act of 1989, Pub. L. 101-131, 103 Stat. 777. Section 700(a) of Title 18, United States Code, now provides:

(a)(1) Whoever knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon any flag of the United

States shall be fined under this title and imprisoned for not more than one year, or both.

(2) This subsection does not prohibit any conduct consisting of the disposal of a flag when it has become worn or soiled.

SUMMARY OF ARGUMENT

I. Appellees' conduct in burning flags was expressive, but that fact only begins the analysis. Incidental regulation of expressive conduct generally is permissible if the government forbids the conduct without drawing distinctions on the basis of the message conveyed. The Flag Protection Act of 1989 does just that. Even if we assume, however, that the Act directly regulates expression, it still should be upheld as long as it is a proper "time, place, or manner" restriction within the meaning of this Court's cases. Thus, the Act must be content neutral, must further a substantial governmental interest, and must leave open alternative channels of communication. *Ward v. Rock Against Racism*, 109 S. Ct. 2746, 2753 (1989).

The Act is content neutral. It differs from statutes whose application this Court has previously struck down, in that it punishes only permanent disfigurements of the flag, and does so without regard to the accompanying words or motives, any attitude of "contempt," or any inquiry into the offensiveness of the defendant's actions. The statute proscribes specified conduct, which may be respectful or contemptuous, and it fails to reach other specified conduct, even when that conduct is intended to communicate disrespect. That is content neutrality.

The contrary holdings of the district courts are based on the erroneous notion that a law is not content neutral whenever it protects symbolic values. But content neutrality depends on whether the government restricts communication based on its content, not on whether the government itself wishes to communicate a message. Likewise, there is no merit whatever to the assertions below that a law can be deemed content based solely because of

the motivations of individual legislators. It is the scope of a statute, not statements in the debates leading to its passage, that demonstrates the intent of the legislature to forbid conduct without regard to the message conveyed by that conduct. This Court squarely so held in *United States v. O'Brien*, 391 U.S. 367, 382-384 (1968).

The Act also is narrowly tailored to serve a significant governmental interest. One need look no further than this Court's cases in order to conclude that the government's interest in protecting the flag, as a symbol of everything that America stands for, is and always has been deemed legitimate and quite substantial. Indeed, the Court reiterated in *Texas v. Johnson* that "the Government has a legitimate interest in making efforts to 'preserv[e] the national flag as an unalloyed symbol of our country.'" 109 S. Ct. 2533, 2547 (1989) (quoting *Spence v. Washington*, 418 U.S. 405, 412 (1974)).

Finally, the Act unquestionably leaves open ample alternative methods for would-be flag burners to convey their messages. It does not prohibit any form of verbal expression, it does not prohibit even the burning of a wide variety of symbols of the United States, and it does not prohibit any conduct, no matter how disrespectful or contemptuous, with respect to worn-out or outmoded flags.

II. Nothing in this Court's decision in *Texas v. Johnson* requires a different result. The statute at issue in that case applied only against actions that gave "offense" to others, and Johnson was punished directly for "the message he conveyed." 109 S. Ct. at 2543. The Flag Protection Act of 1989, by contrast, is content neutral and is "aimed at protecting the physical integrity of the flag in all circumstances" (*ibid.*), "regardless of the motive or political message of any flag burner." H.R. Rep. No. 231, 101st Cong., 1st Sess. 8 (1989). That is no accident. Congress carefully considered—and followed—the advice of eminent constitutional scholars in crafting the Act to comport with *Johnson* and this Court's prior cases.

Congress's carefully deliberated conclusion that this statute is constitutional has additional significance. This Court has often recognized that special respect is owed to the considered interpretation of the Constitution by a coordinate branch. See *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 102 (1973). The explicit congressional determination that this is—and is intended to be—a content-neutral statute is one that a court should not lightly second-guess. Likewise, the deference owed to Congress is at its zenith when Congress makes the inherently legislative judgment that a particular governmental interest is strong. Here, Congress—by overwhelming majorities—has determined that the Nation has a powerful interest in protecting the physical integrity of the American flag, and this Court should not substitute a contrary conclusion.

ARGUMENT

THE FLAG PROTECTION ACT OF 1989 DOES NOT VIOLATE THE FIRST AMENDMENT

Appellees burned flags in order to express political messages. It follows that this case raises a First Amendment issue. But it is equally obvious, both from first principles and from this Court's cases, that not all conduct intended to convey political messages is protected by the First Amendment, or even subjected to exacting scrutiny. Vandalism, terrorism, or public nudity can be very effective ways of expressing political messages, but they nonetheless may be prohibited despite the fact that such criminal statutes may have an incidental effect on freedom of speech. Thus, this Court has upheld a law banning the burning of draft cards, even though the conduct so proscribed in the case that came before this Court was unquestionably expressive. *United States v. O'Brien*, 391 U.S. 367 (1968). This Court also has suggested that a content-neutral ban on the unauthorized wearing of military uniforms would be constitutional, even though such a prohibition would reach expressive conduct. *Schacht v. United States*, 398 U.S. 58, 61

(1970). Moreover, the Court repeatedly has upheld even direct regulations of expressive conduct when those regulations do not depend on the message conveyed by the conduct but instead govern only its permitted time, place, or manner. See, e.g., *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (overnight sleeping in connection with a demonstration is expressive but nevertheless can be proscribed). The Flag Protection Act of 1989 can be upheld under either of those two lines of authority.

I. THE ACT IS VALID AS A "MANNER" RESTRICTION

In *Texas v. Johnson*, 109 S. Ct. 2533 (1989), this Court invalidated under the First Amendment a state statute regulating flag burning for expressive purposes. At the same time, however, the Court intimated that a statute "aimed at protecting the physical integrity of the flag in all circumstances" would be constitutional. *Id.* at 2543 (citing *Smith v. Goguen*, 415 U.S. 566, 590-591 (1974) (Blackmun, J., dissenting)). The key distinction between the two statutes is that the latter regulates conduct without regard to the message that it may or may not convey, and any restrictions on expression are merely an incident of that regulation. See generally *O'Brien*, 391 U.S. at 376-377, 381-382.

Like the statute upheld in *O'Brien*, the Flag Protection Act of 1989 regulates conduct in an evenhanded and content-neutral way. It defines with precision the actions that will not be permitted, and it makes irrelevant the message that may be conveyed or perceived. Furthermore, the Act plainly protects governmental interests that are "unrelated to the suppression of free expression." *O'Brien*, 391 U.S. at 377. The Act may sweep within its terms some expressive conduct—as well as nonexpressive conduct—but that was true in *O'Brien* as well, and does not call for heightened scrutiny.¹

¹ Thus, Judge Rothstein was quite wrong to apply heightened scrutiny just because the Flag Protection Act can be said to be "related to expression." There is no substantive significance to the

Even if we assume, however, that the Flag Protection Act directly regulates expression, by no means does it follow that the Act is unconstitutional. "Expression, whether oral or written or symbolized by conduct, is subject to reasonable time, place, or manner restrictions." *Clark v. CCNV*, 468 U.S. at 293. Any restriction on expression that even arguably exists in this case involves not any particular message, or even the time or place of communicating that message, but solely the *manner* in which the message is communicated. Nothing inhibits appellees from conveying—by word or, within limits, by deed—their opposition to "various aspects of United States domestic and foreign policy" (89-1433 J.S. App. 2a). But Congress, after solemn deliberation, has concluded that one *manner* of expression—mutilating, defacing, physically defiling, burning, maintaining on the floor or ground, or trampling on an American flag—is not open to them or to anyone else.

Therefore, on the generous assumption that the Flag Protection Act should be viewed as a statute regulating expression, it is appropriate to analyze the constitutionality of the Act under this Court's "time, place, or manner" restriction cases. Cf. *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522, 536 (1987) ("Section 110 [limiting use of the word 'Olympic'] restricts only the *manner* in which the SFAA may convey its message.") (emphasis added). Like the

fact that "[t]he *Johnson* [opinion] itself uses the phrases 'related to expression' and 'related to the suppression of expression' interchangeably" (89-1434 J.S. App. 11a). The Court in *Johnson* plainly used the phrase "related to expression" merely as shorthand for the standard phrase "related to the suppression of expression," which has been used at least since *O'Brien*, 391 U.S. at 377, to distinguish strictly scrutinized regulations of expression from leniently scrutinized regulations of conduct with incidental impacts on expression. It is inconceivable that the Court meant to effect a radical expansion of the category of laws that will be strictly scrutinized under the First Amendment to encompass every law "related to expression" but unrelated to the suppression of expression. See *Senate Hearings* 203-204, 208 (testimony of Dean Geoffrey R. Stone); *id.* at 543-544, 567 (testimony of Prof. Walter Dellinger).

restrictions on the permissible color and size of reproductions of currency upheld in *Regan v. Time, Inc.*, 468 U.S. 641 (1984), the Act's restrictions on damaging the flag do not require "the Government * * * to evaluate the nature of the message being imparted in order to enforce" them. *Id.* at 656 (plurality opinion). They regulate not the content but the *manner* of conveying the message.

On many occasions, most recently in *Ward v. Rock Against Racism*, 109 S. Ct. 2746 (1989), this Court has set forth a three-part test for the validity of time, place, or manner restrictions. The restrictions must be content neutral, must be narrowly tailored to serve a significant governmental interest, and must leave open ample alternative channels for communication of the information. 109 S. Ct. at 2753; see also *Regan v. Time, Inc.*, 468 U.S. at 648 (opinion of the Court). The Flag Protection Act meets each of those three criteria.

A. The Flag Protection Act Is Content Neutral.

1. *Unlike prior flag statutes, the Act covers actions that permanently damage a flag, without regard to the individual's message.*

The Flag Protection Act of 1989 is, on its face, evenhanded. The courts below acknowledged as much. 89-1434 J.S. App. 10a ("the Act on its face is applicable to anyone who engages in certain conduct regardless of the actor's intent or the impact of the conduct"); 89-1433 J.S. App. 13a ("on the face of the statute the same rules apply to everyone").² The Act thus differs from any flag

² It simply is not true, as Judge Green went on to assert, that "[t]he application of the Flag Protection Act turns on whether the speaker seeks to show disrespect for the flag" (89-1433 J.S. App. 14a n.8). Nor is it true that, "in protecting the flag for those who wish to waive [*sic*] it in support of [symbolic] causes, but preventing the defendants from burning it in opposition, the government has created a regulation which cannot be justified without reference to the content of the defendants' message" (*id.* at 14a). The Act prohibits specified *conduct*—such as burning the flag—without regard to the intention of the so-called "speaker," and it fails to reach other

protection statute that has ever before been passed by Congress or considered by this Court.

Unlike the 1968 federal flag protection statute, 18 U.S.C. § 700 (1982), the Act does not contain any provision punishing the act of "cast[ing] contempt" on the flag. Unlike the Texas statute at issue in *Johnson*, the Act does not limit its prohibitions to acts that "seriously offend one or more persons." Unlike the state statute at issue in *Spence v. Washington*, 418 U.S. 405 (1974), the Act does not reach any conduct that does not "permanently disfigure the flag or destroy it" (*id.* at 415). Unlike the Massachusetts statute at issue in *Smith v. Goguen*, 415 U.S. 566 (1974), the Act does not punish anyone merely for treating the flag "contemptuously." And unlike the state statute at issue in *Street v. New York*, 394 U.S. 576 (1969), the Act does not in any way reach verbal flag contempt.

These are not idle distinctions. The Court in each of its flag cases was careful to emphasize that its analysis would not control a case in which the particular defect noted above was lacking. See *Johnson*, 109 S. Ct. at 2543; *Spence*, 418 U.S. at 415; *Smith v. Goguen*, 415 U.S. at 581-582 ("Certainly nothing prevents a legislature from defining with substantial specificity what constitutes forbidden treatment of United States flags."); *Street*, 394 U.S. at 594 ("we have no occasion to pass upon the validity of this conviction insofar as it was sustained by the state courts on the basis that Street could be punished for his burning of the flag, even though the burning was an act of protest"). Thus, as Professor Laurence H. Tribe testified before the Senate Judiciary Committee after analyzing each of those cases, "[n]ot one [J]ustice has ever expressed doubt about" the proposition "that the goal of protecting the physical integrity of flags * * * is attainable under the Constitution as it

specified *conduct*—such as waving the flag—equally without regard to message. The person who waves his flag while shouting epithets at it cannot be prosecuted, and the person who burns his flag with the utmost respect can be.

now stands." *Senate Hearings* 142; see also *id.* at 537 (statement of Prof. Walter Dellinger).

The Flag Protection Act is an attempt to meet this Court's concerns in attaining the goal of protecting the physical integrity of flags under the Constitution as it now stands. The Act plainly proscribes the respectful as well as the contemptuous burning of any unsoiled flag (18 U.S.C. § 700(a)(1)), and it plainly fails to reach the contemptuous as well as the respectful disposition of any worn or soiled flag (18 U.S.C. § 700(a)(2)). The Act was intended to prohibit specific *conduct* that is designed permanently to damage an American flag, without regard to the actor's motive, the message he intends to convey, or the effects that his actions have on others. See pages 4-5, *supra*; *Senate Hearings* 183-184, 194-195 (statement of Dean Geoffrey R. Stone). That is content neutrality.³

2. The Act is not content based merely because it protects a symbol.

Both courts below determined that, despite its facial evenhandedness, the Flag Protection Act is not content neutral. 89-1433 J.S. App. 12a-14a; 89-1434 J.S. App. 9a-11a. According to the two district courts, *any* legislation that protects the flag "as a symbol" is not content neutral, whatever its scope. That reasoning reflects a fundamental misunderstanding of this Court's cases.

Whether a law is content neutral depends entirely on whether the expression that it restricts receives differen-

³ Judge Rothstein "quickly dismissed" the argument, that, because it protects the physical integrity of the flag in all circumstances, the Flag Protection Act is content neutral. 89-1434 J.S. App. 11a-12a n.6. She pointed out that flying the flag in inclement weather and carrying it into battle are not prohibited. If those actions are not prohibited, however, it is simply because one who flies the flag in inclement weather or carries it into battle has not "knowingly" acted to harm the flag. In order to protect the physical integrity of the flag in all circumstances, Congress has required that no one knowingly destroy that physical integrity. No First Amendment doctrine requires Congress to go further and insist that no one even expose the flag to situations that might threaten it.

tial treatment on the basis of its content; it does not depend in any way on the fact that the government is itself expressing views. Government-enforced orthodoxy is anathema to our constitutional system, but so is the idea that the government must itself be a philosophical cipher, standing for absolutely nothing. It is the essence of democratic governance, not a suspicious activity, for the people's elected representatives to decide what is and what is not deserving of legal protection.

Thus, as Justice (then Judge) Scalia pointed out four years ago, "the guarantee of freedom of speech 'does not mean that government must be ideologically "neutral," or 'silence government's affirmation of national values,' or prevent government from 'add[ing] its own voice to the many that it must tolerate.'" *Block v. Meese*, 793 F.2d 1303, 1314 (D.C. Cir. 1986) (quoting L. Tribe, *American Constitutional Law* § 12-4, at 588, 590 (1978)).⁴ A law prohibiting anyone from harming a bald eagle could be justified in large part by the government's recognition of the value of that bird "as a symbol," but nothing in this Court's cases suggests the bizarre conclusion that such a law is content based. As Professor Tribe commented in testimony before the Senate Judiciary Committee (*Senate Hearings* 151-152):

We ban the desecration of gravesites * * * primarily because most people think of such conduct as deeply offensive in itself, regardless of whether any particular act of grave desecration is meant to convey an offensive message, or is so interpreted by a particular observer. And the fact that we enact such a prohibition largely out of concern for what a grave symbolizes or represents does not transform the prohibition into one secretly based on the desire to suppress a message. * * *

The principle I have in mind is the same as the one which justifies especially harsh punishment for those who deface places of religious worship as op-

⁴ This Court agreed with the First Amendment holding of *Block* in *Meese v. Keene*, 481 U.S. 465 (1987).

posed to places of business. Places of worship * * * are, of course, inherently expressive of religious values, and are cherished in large part *because* they express those values. But it simply does not follow that the decision to give such places special protection * * * represents a desire to suppress, censor, or penalize whatever anti-religious message someone who defaces a church or synagogue might want to convey.

If the government enacts an evenhanded statute protecting bald eagles, or gravesites, or places of religious worship, or American flags, that statute is not and cannot be *ipso facto* content based.

For these reasons, there is no merit to the self-referential theory that any law protecting a symbolic object fails the content-neutrality test because it only limits the expression of those who wish to advance an idea opposite to the one represented by the protected object. No decision of this Court supports such a radical theory.⁵ But even if the theory had validity in some circumstances, it would not apply to the flag, which does not represent

⁵ To say that a law protecting a symbol is content based because it affects only those who oppose the symbol's underlying message would be to say, in essence, that content neutrality depends not only on the evenhandedness with which a law *treats* all persons but also on the uniformity of its *impact* on everyone. But no holding of this Court supports the application of such a disparate impact theory. See *Johnson*, 109 S. Ct. at 2557 n.* (Stevens, J., dissenting). There was no need for the Court to adopt such a theory in *Johnson*, because the Texas statute on its face discriminated between those who offended others and those who did not. The adoption of a disparate impact theory of free speech analysis would revolutionize First Amendment doctrine. For example, it would have required a different result in *Clark v. CCNV*, *supra*, where the ban on sleeping in Lafayette Park surely impeded those who wished to communicate about the plight of the homeless more than it impeded any other "speakers," and in *O'Brien*, where the impact of the ban on burning draft cards was felt primarily if not exclusively by antiwar protestors. These and other severe problems with the application of disparate impact analysis in the First Amendment context are thoroughly addressed in Stone, *Content-Neutral Restrictions*, 54 U. Chi. L. Rev. 46, 81-86 (1987).

any single idea or value. "[T]he flag is worthy of protection not because it represents any one idea, but because it represents many ideas. As the testimony of every witness demonstrated, the flag represents different things to different people." S. Rep. No. 152, *supra*, at 3. See also *Johnson*, 109 S. Ct. at 2552 (Rehnquist, C.J., dissenting) (The flag "does not represent any particular political philosophy * * * [and] is not simply another 'idea' or 'point of view' competing for recognition in the marketplace of ideas."). The fact that the Flag Protection Act preserves the physical integrity of that multifaceted symbol cannot render it content based.

3. The Act cannot be deemed content based because of the motivations of individual legislators.

Nor is a law content based just because some legislators were motivated more by a desire to reach conduct conveying one particular message than conduct conveying a different message. What matters is whether the legislature discriminated on the basis of content in determining the conduct that it would proscribe, not whether legislators were more enthusiastic about prohibiting some conduct than about prohibiting other conduct.⁶

⁶ Many of the proponents of a constitutional amendment to overturn this Court's decision in *Johnson* argued that distinctions *should* be drawn between protestors like Gregory Johnson and others whose treatment of the flag indicated respect. Accordingly, appellees will have no trouble in trotting out statements from the legislative history that can be misused to ascribe an impermissible motivation to Congress. As we discuss in text, however, that is not a proper way to determine whether a statute is content neutral. Moreover, those sentiments were expressed in support of an approach that Congress as a whole *rejected* in favor of an approach that scrupulously avoids content-based distinctions. See generally H.R. Rep. No. 231, *supra*, at 2; S. Rep. No. 152, *supra*, at 10; 135 Cong. Rec. S7457 (daily ed. June 23, 1989) (remarks of Sen. Biden); *id.* at S12620 (daily ed. Oct. 4, 1989) (remarks of Sen. Biden). Thus, although we do not think that the legislative history has a proper role to play in this Court's determination whether the Act is content neutral, a properly focused inquiry into the legislative history would in any event confirm the content-neutral nature of the statute.

In particular, nothing could possibly be more incorrect than Judge Rothstein's statement (89-1434 J.S. App. 10a), echoed by Judge Green (89-1433 J.S. App. 13a), that "it is the *reason* for the legislation and not its *scope* which determines content-neutrality." The flaw in that statement is not that the "reason" for legislation is irrelevant, but that the only proper way to determine the reason for any legislation is to look at its scope. Here, the scope of the legislation is to reach certain well-defined actions directed against the flag and to exempt others, and the only reliable evidence of Congress's—as opposed to any individual legislator's—"reason" for enacting the statute is the text of the statute, which shows what actions Congress was willing (however enthusiastic or unenthusiastic particular legislators may have been) to interdict. In this case, Congress's approach is entirely in keeping with Justice Brennan's statement that "the best protection against governmental attempts to squelch opposition has never lain in our ability to assess the purity of legislative motive but rather in the requirement that the government act through content-neutral means that restrict expression the government favors as well as expression it disfavors." *Boos v. Barry*, 485 U.S. 312, 336-337 (1988) (opinion concurring in part and concurring in the judgment).

One need not read tea leaves from this Court's opinion in *Johnson*, as the courts below did, in order to determine whether it is a law's "scope," or its "reason" as shown by legislative history, that determines content neutrality. For the Court has addressed that question directly, in a passage fully applicable to this case:

O'Brien finally argues that the 1965 Amendment is unconstitutional as enacted because what he calls the "purpose" of Congress was "to suppress freedom of speech." We reject this argument because under settled principles the purpose of Congress, as O'Brien uses that term, is not a basis for declaring this legislation unconstitutional.

It is a familiar principle of constitutional law that this Court will not strike down an otherwise con-

stitutional statute on the basis of an alleged illicit legislative motive. * * *

Inquiries into congressional motives or purposes are a hazardous matter. When the issue is simply the interpretation of legislation, the Court will look to statements by legislators for guidance as to the purpose of the legislature * * *. It is entirely a different matter when we are asked to void a statute * * *. We decline to void essentially on the ground that it is unwise legislation which Congress had the undoubted power to enact and which could be reenacted in its exact form if the same or another legislator made a "wiser" speech about it.

O'Brien, 391 U.S. at 382-384 (footnote omitted); accord *Edwards v. Aguillard*, 482 U.S. 578, 636-639 (1987) (Scalia, J., dissenting).

It is certainly true that this Court on occasion has spoken in terms of legislative "purpose" or "justification" in describing the content-neutrality test. See, e.g., *Ward*, 109 S. Ct. at 2754; *Boos*, 485 U.S. at 319-321 (plurality opinion); see also *Community for Creative Non-Violence v. Watt*, 703 F.2d 586, 622-623 (D.C. Cir. 1983) (Scalia, J., dissenting), rev'd *sub nom. Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984), quoted in *Johnson*, 109 S. Ct. at 2540. But the Court has never used that term as an excuse to invoke legislative history in order to strike down facially neutral legislation. See *Senate Hearings* 163 (testimony of Prof. Tribe).

When the Court has invalidated legislation on the basis of its content-based "purpose," the suspect "purpose" has been evident either from the statute itself (e.g., *Boos*, 485 U.S. at 318-319 (plurality opinion) ("[w]hether individuals may picket in front of a foreign embassy depends entirely upon whether their picket signs are critical of the foreign government")) or from the government's complete inability to offer *any* reason for the prohibition other than banning the expression of particular points of view associated with the forbidden conduct (see generally *CCNV v. Watt*, 703 F.2d at 624-625 (Scalia, J., dissent-

ing) (analyzing cases)).⁷ Neither situation exists here. The Flag Protection Act is carefully crafted *not* to make its prohibitions turn on the content of any "expression" associated with the forbidden conduct, and the government's interest in protecting the physical integrity of *all* unworn flags—an interest repeatedly recognized as valid by this Court—is aimed at completely unexpressive conduct, as well as conduct that damages a flag as a protest, as well as conduct that somehow injures a flag pursuant to expression intended as a show of respect.

In sum, nothing that was said in the opinions below comes close to refuting the obvious fact that the Act is content neutral. One may perhaps question how much weight should be accorded the government's interest in protecting the flag as a symbol—a point addressed in the next section—but the fact that the government's interest relates to national symbols has absolutely nothing to do with whether Congress has drawn content-based distinctions. Likewise, the legislative history is no basis for imputing expression-prohibiting purpose to a pure conduct-regulating statute that has non-expression-related justifications. This step of the district courts' analysis is insupportable.

B. The Flag Protection Act Is Narrowly Tailored To Serve A Significant Governmental Interest.

Notwithstanding the effort by the courts below to pigeonhole the Flag Protection Act with "content-based" laws that restrict expression directly, the true thrust of the district courts' opinions is that the government's interest in preserving the flag, as a symbol of all that this Nation stands for, is either illegitimate altogether or so very weak as to be outweighed by the positive social value of the forbidden conduct. That is the only coherent explanation for striking down a statute not on the the basis

⁷ Thus, as Justice (then Judge) Scalia concluded, the relevant distinction is between "conduct-prohibiting" laws and "expression-prohibiting laws." 703 F.2d at 626. The distinction depends on the laws and not on the motivation of the legislators.

of what it forbids, but on the basis of what the government is trying to accomplish. But that low estimation of the government's interest in preserving the symbolic value of the flag is hardly compelled by this Court's cases; in fact, this Court's cases squarely contradict that view.

Halter v. Nebraska, 205 U.S. 34 (1907), may be explainable as a case resting on the "commercial speech" doctrine (see *Johnson*, 109 S. Ct. at 2545 n.10), but that does not make its pronouncements about the flag any less worthy of respect in a different context. Speaking through the first Justice Harlan, the Court wrote:

It is not * * * remarkable that the American people, acting through the legislative branch of the Government, early in their history, prescribed a flag as symbolical of the existence and sovereignty of the Nation. Indeed, it would have been extraordinary if the Government had started this country upon its marvelous career without giving it a flag to be recognized as the emblem of the American Republic. For that flag every true American has not simply an appreciation but a deep affection. * * * Hence, it has often occurred that insults to a flag have been the cause of war, and indignities put upon it, in the presence of those who revere it, have often been resented and sometimes punished upon the spot. * * *

Such an use [for trade and traffic] tends to degrade and cheapen the flag in the estimation of the people, as well as to defeat the object of maintaining it as an emblem of National power and National honor.

205 U.S. at 41-42. The *Halter* Court, it is true, had no occasion to pass on the status of a general flag protection law under the First Amendment, but there is no doubt what the Members of the Court would have thought of the argument that the United States had only an illegitimate or a weak interest in preservation of the flag's symbolic power.

In *Street*, the Court, speaking through the second Justice Harlan, wrote that "disrespect for our flag is to be deplored no less in these vexed times than in calmer pe-

riods of our history." 394 U.S. at 594 (citing *Halter*). The Court overturned a conviction because it could have been based on spoken words, but it was careful to point out that it was not resolving the question whether an expressive act of flag burning was entitled to constitutional protection. *Ibid.* Similarly, in *Smith v. Goguen*, the Court was surely well aware that *any* flag protection statute will necessarily be designed to protect the flag's symbolic value, but the Court hardly implied any blanket condemnation of such laws. Instead, the Court affirmatively encouraged legislators to draft such statutes, but to do so with specificity and care. 415 U.S. at 581-582 & nn.30-31. And in *Spence*, the Court "assume[d], *arguendo*" (418 U.S. at 414), that the State had a legitimate interest "based on the uniquely universal character of the national flag as a symbol" (*id.* at 413). In each of these cases, of course, a strong dissent—joined by one or more of Chief Justice Warren, Chief Justice Burger, (now) Chief Justice Rehnquist, Justice Black, Justice White, Justice Fortas, or Justice Blackmun—suggested that the majority did not go far enough in protecting the flag's unique symbolic value.

Most important, the argument that the courts below accepted on the basis of *Texas v. Johnson* is in fact *foreclosed* by *Johnson*. The Court in that case wrote:

[W]e do not doubt that the Government has a legitimate interest in making efforts to "preserv[e] the national flag as an unalloyed symbol of our country." We reject the suggestion, urged at oral argument by counsel for Johnson, that the Government lacks "any state interest whatsoever" in regulating the manner in which the flag may be displayed.

109 S. Ct. at 2547 (citation omitted).

Thus, it is irrefutable that this Court has consistently recognized as legitimate the government's interest in protecting the flag *as a symbol*. That being so, there is no possible basis to deem that interest so weak as to be outweighed by the relatively minor First Amendment interest in expressing oneself through the particular manner

of burning or otherwise performing a forbidden act on a flag. Indeed, although the Constitution may well assign to this Court the duty to separate legitimate from illegitimate governmental interests in many instances, the determination of the *weight* that should be accorded to a legitimate interest is quintessentially a legislative matter. Congress's action in promptly passing the Flag Protection Act by overwhelming margins leaves no doubt about how the Legislative Branch assesses the strength of the government's interest. The second part of the test for sustainable "time, place, or manner" restrictions, to the extent that it focuses on the strength and legitimacy of the government's interest, is plainly met.

There remains the requirement that the legislation be narrowly tailored to achieve its legitimate end. But, as this Court was at pains to emphasize last Term, that requirement is *not* a "least-intrusive-means" requirement that allows a court to substitute every possible alternative for the statute that the legislature actually passed and to strike that statute down if unsatisfied that the legislature has made the optimal choice. *Ward*, 109 S. Ct. at 2756-2760. Rather, "[s]o long as the means chosen are not substantially broader than necessary to achieve the government's interest, * * * the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." *Id.* at 2758. Here, there is no reason to believe that Congress could have legislated more narrowly and still achieved its legitimate end of protecting the physical integrity, and hence the symbolic value, of the flag. In fact, the courts below focused not on *narrower* regulations that would have achieved the government's end, but on hypothetical events that supposedly made the legislation *not broad enough* to achieve that end. See, e.g., 89-1434 J.S. App. 12a n.6. There is simply no basis for thinking that this carefully crafted statute impinges on free speech more than is necessary to preserve the flag's unique status. See *Clark v. CCNV*, 468 U.S. at 297.

This Court in *Johnson* stated that no "separate juridical category exists for the American flag" and that there should not be "create[d] for the flag an exception to the joust of principles protected by the First Amendment." 109 S. Ct. at 2546. The Flag Protection Act honors those views, but the opinions below do not. By subjecting flag protection legislation to especially strict scrutiny merely because that which is deemed worth preserving is symbolic rather than materialistic, and by rejecting a governmental interest that this Court has *always* regarded as legitimate and strong, the district courts created an exception to the usual principles guiding decision under the First Amendment. Under standard First Amendment doctrine, however, the statute is content neutral and is based on a legitimate purpose, and therefore it should be upheld as long as it does not foreclose alternative methods of expression of the same ideas.

C. The Flag Protection Act Allows Ample Alternative Avenues Of Expression.

That flag burners with an expressive purpose have ample alternative ways to express themselves is so obvious that it should require little explanation. To protest American policies, or express any other idea they wish, individuals may use a virtually limitless variety of media of verbal expression, and they may engage in a wide range of conduct as well. Indeed, they may engage in conduct quite similar to flag burning: nothing in the law forbids a symbolic burning of an effigy of Uncle Sam, for example, or burning any red, white, and blue cloth that is not a flag, or immolating any other privately owned symbol of America, no matter how offensive or provocative the act may be. Moreover, the statute permits the flag itself to be used in a variety of expressive ways. Only "one rather inarticulate symbolic form of protest" (*Johnson*, 109 S. Ct. at 2554 (Rehnquist, C.J., dissenting))—physical destruction of the American flag—is made illegal.⁸

⁸ To be sure, the inability of a protestor to draw attention to himself by engaging in particularly disruptive conduct may have some

The only basis for any confusion on this point is a possible misinterpretation of the footnotes in *Spence*, 418 U.S. at 411 n.4, and *Johnson*, 109 S. Ct. at 2546 n.11, stating that it is not a *sufficient* basis for the abridgment of First Amendment freedoms that there are alternative channels of communication. The point here, of course, is not that the existence of such alternatives by itself suffices to save an otherwise invalid statute, but that the existence of such alternatives is necessary in addition to the other prerequisites to a valid time, place, or manner restriction already discussed. See, e.g., *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 812 (1984). Those prerequisites are met here, and the existence of ample alternative channels of communication confirms that the Flag Protection Act is valid under standard First Amendment doctrine.

Nothing could be more illiberal than the attitude of someone who insists that he will convey his message in one and only one way—notwithstanding the existence of many effective alternatives, and the determination of popularly elected legislators that that which the protestor wishes to destroy is something worth preserving. Our First Amendment quite properly ensures in no uncertain terms that a Gregory Johnson or a Shawn Eichman will not be silenced—or punished because of his message—but those majestic commands of the Constitution are not

marginal effect on his ability to attract a wide audience. But attention-getting and free speech are not the same thing. The First Amendment does not invalidate a legitimate restriction on expressive conduct, where alternative methods of expression exist, merely because the proscribed conduct is the means that the speaker believes is most effective for communicating his message. See *Clark v. CCNV*, 468 U.S. at 294-296; *Heffron v. Int'l Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 653-655 (1981). Thus, a modern-day Lady Godiva would, entirely consistent with the First Amendment, be relegated (if she wished to stay within the law) to forms of expression less notorious than nude horseback riding. Similarly, unless this Court is prepared to reverse its previous pronouncements and brand the government's interest in protection of the physical integrity of the flag "illegitimate," there is no First Amendment right to harm the flag just because doing so will attract attention.

at issue here. Far from being silenced, appellees were free to dramatize their points of view in many ways, or to speak their minds in eloquent or crude terms, as they chose. What they were not free to do, but chose to do anyway, was to defy the statute that tries in an even-handed way to preserve the flag for everyone. The uniquely American values that the flag symbolizes—and the Constitution enshrines—do not just protect the lonely protestor against an intolerant public that will brook no debate; they also protect the lonely flag against an intolerant protestor who will accept no method of debate but his own destructive one.

II. THIS COURT'S DECISION IN *TEXAS v. JOHNSON* DOES NOT REQUIRE INVALIDATION OF THE FLAG PROTECTION ACT

The district courts invalidated the Flag Protection Act of 1989 in the apparent belief that the constitutionality of the federal statute is governed by this Court's decision in *Texas v. Johnson*. But the Court's analysis in *Johnson* was limited by its clear terms to content-based flag desecration statutes. Indeed, Congress concluded—based on a careful review of the relevant constitutional principles—that the Flag Protection Act is materially distinguishable from the Texas law before the Court in *Johnson*, because it is (and is intended to be) content neutral, and that the federal statute would pass muster under the First Amendment. That considered constitutional judgment of a coequal branch of the federal government also distinguishes this case from *Johnson* and weighs in favor of upholding the federal statute.

A. This Court's Decision In *Johnson* Rested On The Determination That The Texas Statute Was Not Content Neutral; The Flag Protection Act, By Contrast, Is Content Neutral.

The Texas statute before the Court in *Johnson* made it a crime to "desecrate[]" the flag; that term was defined as "deface, damage, or otherwise physically mistreat in a way that the actor knows will seriously offend

one or more persons likely to observe or discover his action." 109 S. Ct. at 2537 n.1. The Court held that, because the statute applied "only against impairments [of the flag's physical integrity] that would cause serious offense to others," it was content based: Texas law restricted Johnson's speech on the basis of "the message he conveyed." *Id.* at 2543.

The conclusion that the Texas statute was not content neutral dictated the remainder of the Court's analysis. The Court subjected the state interests advanced in support of the statute to "'the most exacting scrutiny,'" an extremely strict standard reserved for content-based restrictions on speech. *Johnson*, 109 S. Ct. at 2543 (quoting *Boos*, 485 U.S. at 321). And, as is typically the case when a statute is examined under that stringent standard, the state interests underlying the statute were found insufficiently weighty to justify the content-based restriction. 109 S. Ct. at 2544-2548.

It is apparent that the Court's analysis in *Johnson* does not apply in the present case because the Flag Protection Act is content neutral. Instead of the strict First Amendment standard applicable to content-based limitations on speech applied in *Johnson*, the constitutionality of this evenhanded federal statute turns on a considerably less demanding standard. A content-neutral time, place, or manner restriction will be upheld against First Amendment challenge if the restriction is narrowly tailored to serve a significant governmental interest and leaves open adequate alternative means of expression. As we have shown above, the Act plainly satisfies that test.

Indeed, the Court in *Johnson* expressly recognized that its analysis would not apply to a statute like the Flag Protection Act. The Court supported its conclusion that the Texas statute was content based by contrasting that law with a (then) hypothetical statute "aimed at protecting the physical integrity of the flag in all circumstances." 109 S. Ct. at 2543. The clear implication of the Court's comparison is that a statute applicable "in

all circumstances" would be subject to less stringent constitutional analysis.

Of course, it is not mere happenstance that the Flag Protection Act does not contain the constitutional defect identified by the Court in *Johnson*. Congress expressly set out to amend the federal statute prohibiting destruction of the flag to eliminate the constitutional flaws identified in *Johnson*. Distinguished constitutional scholars testified that the principal defect in the Texas statute was that its applicability turned on the content of the expressive message that Johnson sought to convey. As Dean Stone observed in his testimony before the Senate Judiciary Committee, "[u]nlike the Texas law invalidated in *Johnson*, the proposed legislation is not content based, it is not directly related to the suppression of free expression, and its constitutionality is thus not controlled by the principles that dictated the outcome in *Johnson*." *Senate Hearings* 184; see also *id.* at 527 (Prof. Gordon B. Baldwin and Brady C. Williamson) (the "greatest flaw [in the Texas statute] was that it punished the expression not of any point of view but the expression of only one point of view, defined as 'offensive' by the beholder. It was not content-neutral"); *id.* at 542-543 (Prof. Dellinger); *id.* at 723 (Prof. Henry Monaghan).

Moreover, after considering this testimony, Congress itself concluded that "the decision in *Johnson* was expressly predicated on the determination that the Texas law was triggered by the offensiveness of the actor's conduct." S. Rep. No. 152, *supra*, at 8. "[T]he problem with the Texas statute was that it * * * 'was not * * * content-neutral.'" *Ibid.* (citation omitted); see also *id.* at 12. As the House Judiciary Committee put it, "[i]n all of [this Court's opinions in cases involving flag desecration], the Court indicated that it would look differently on a content-neutral statute that would protect the physical integrity of the flag in all circumstances, one that focused solely on conduct and did not turn on the message being conveyed by the flag burner." H.R. Rep. No. 231, *supra*, at 7-8.

Congress thus adopted the very statute that the Court itself excluded from its holding in *Johnson*—a law “aimed at protecting the physical integrity of the flag in all circumstances.” For that reason, the decision in *Johnson* does not dictate the outcome of a constitutional challenge to this congressional enactment.

B. Congress’s Determinations That The Flag Protection Act Is Content Neutral And Therefore Constitutional Are Entitled To Deference.

There is a second critical distinction between *Johnson* and the present case. Although there was no evidence that the Texas legislature had ever thought about the constitutional problems raised by the state flag desecration statute, Congress gave careful consideration to the constitutionality of the Flag Protection Act and concluded that the statute comports with the requirements of the First Amendment. That determination by a coequal branch of the federal government is entitled to considerable deference.

“Whenever called upon to judge the constitutionality of an Act of Congress—‘the gravest and most delicate duty that this Court is called upon to perform,’—the Court accords ‘great weight to the decisions of Congress.’” *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981) (citations omitted); see also *Walters v. National Ass’n of Radiation Survivors*, 473 U.S. 305, 319 (1985). The Court has deferred to Congress’s constitutional judgments in a variety of contexts, including the assessment of a statute’s validity under the First Amendment. See *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 102 (1973). “The customary deference accorded the judgments of Congress is certainly appropriate when, as here, Congress specifically considered the question of the Act’s constitutionality.” *Rostker*, 453 U.S. at 64.

Congress labored mightily to ascertain how the relevant constitutional principles applied to the Flag Protection Act. The principal focus of the congressional

hearings was the constitutionality of the proposed legislation. A number of scholars testified that the measure comports with this Court’s First Amendment jurisprudence. See, e.g., *Senate Hearings* 541-545 (Prof. Dellinger); *id.* at 526-534 (Prof. Baldwin and Williamson); *id.* at 724 (Prof. Monaghan). The committee reports contain lengthy discussion of the statute’s validity and conclude that the Flag Protection Act is consistent with the First Amendment. S. Rep. No. 152, *supra*, at 9-15; H.R. Rep. No. 231, *supra*, at 7-9. By adopting the statute, Congress endorsed that conclusion. See also U.S. Const. Art. VI (“[t]he Senators and Representatives * * * shall be bound by Oath or Affirmation, to support this Constitution”).

In these circumstances, where the Senate and House of Representatives have each expressly focused on and debated the constitutional issues, Congress’s determination that the statute does not violate the First Amendment is entitled to substantial deference. In particular, the Court should defer to two congressional findings, peculiarly legislative in nature and the subject of considerable attention, that underlie Congress’s assessment of the statute’s constitutionality.

First, Congress concluded that the statute is content neutral. The Senate Report stated that, unlike the law struck down in *Texas v. Johnson*, the Flag Protection Act is independent of the likely communicative impact of the conduct and aimed at protecting the physical integrity of the flag in all circumstances. S. Rep. No. 152, *supra*, at 10; see also H.R. Rep. No. 231, *supra*, at 2. Surely Congress’s determination regarding the scope of its statute is a subject on which Congress is especially competent to opine.

Second, Congress made clear that protection of the physical integrity of the flag is an important governmental interest. The Senate Judiciary Committee observed that “the American flag has an historic and intangible value unlike any other symbol.” S. Rep. No. 152, *supra*, at 2. It characterized the flag as “the visible

embodiment of our Nation," noting that the flag led American troops into battle, "signifies our national presence in schools, public buildings, battleships and airplanes"; is "joyously flown over town squares on the Fourth of July"; and is the subject of the Pledge of Allegiance. *Ibid.* "The flag of the United States * * * is a unique symbol that serves a unique purpose. Today, in what is the most heterogeneous and diverse democracy in the world, the flag, in Chairman Biden's words, 'pulls people together * * * [and] helps generate a kind of tolerance that is required in such a diverse society.'" *Id.* at 3 (citation omitted); see also H.R. Rep. No. 231, *supra*, at 2, 9. This Court should not lightly reject Congress's considered judgment regarding the substantiality of this governmental interest.

Ultimately, of course, this Court must make the final decision with respect to these issues. But Congress's reasoned determination that the Flag Protection Act, which was passed by overwhelming majorities in both Houses, does not improperly interfere with freedom of expression should be accorded great weight in the Court's assessment of the statute's constitutionality.

CONCLUSION

The judgments of the district courts should be reversed.

Respectfully submitted.

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APR 18 1990

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In the Supreme Court of the United States

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BRIEF FOR THE SPEAKER AND LEADERSHIP GROUP OF THE U.S.
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APRIL 1990

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STATEMENT OF THE CASE

The Speaker and Leadership Group of the United States House of Representatives ("House *Amici*") respectfully submit this brief as *amici curiae*, to provide an offi-

(1)

cial defense of a challenged Act of Congress, the Flag Protection Act of 1989 ("the Act"), Pub. L. No. 101-131, 103 Stat. 777 (amending 18 U.S.C. §700).¹ Last year, in *Texas v. Johnson*, 109 S. Ct. 2533 (1989), this Court struck down Texas's provision prohibiting "seriously offensive" desecration of venerated objects, including flags, as a non-neutral imposition on expressive conduct. That decision called into question the existing federal prohibition against "cast[ing] contempt" on the flag, 18 U.S.C. §700, since it might also have been challenged as non-neutral.

In response, the House and Senate Judiciary Committees, through their subcommittees of jurisdiction, each held hearings to receive official, scholarly, and public views.² The House Judiciary Committee Report on the Act summarizes what they found. "At the Subcommittee's five hearings, witnesses represented three basic positions: Congress should (1) do nothing; (2) amend the Constitution; or (3) amend the current federal flag desecration statute to conform to the *Texas v. Johnson* opinion." H.R. Rep. No. 231, 101st Cong., 1st Sess. 7 (1989). Congress found little support for the choice to "do nothing," and shelved, for now, the constitutional amendment, notwithstanding its powerful support.³ Instead, Congress chose to

¹ For the purposes of this brief, the Leadership Group joining the Speaker consists of Majority Leader Richard A. Gephardt and Majority Whip William Gray III. Republican Leader Robert Michel and Republican Whip Newt Gingrich declined to join in this brief. Counsel for the Defendants and the Solicitor General have consented to the filing of this brief. Their letters of consent are being lodged with the Clerk of the Court.

² See *Hearings on Measures to Protect the Physical Integrity of the Flag: Hearings Before the Senate Comm. on the Judiciary*, 101st Cong., 1st Sess. (1989) ("Senate Hearings"); *Statutory and Constitutional Responses to the Supreme Court Decision in Texas v. Johnson: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 101st Cong., 1st Sess. (1989) ("House Hearings").

³ President Bush and Attorney General Thornburgh urged a constitutional amendment. *Senate Hearings* at 119. The House and Senate Republican Leaders testified in support of constitutional amendments. *House Hearings* at 30 (Rep. Michel); *Senate Hearings* at 376 (Sen. Dole).

comply with *Texas v. Johnson* by following its prescription that the Constitution permits "protecting the physical integrity of the flag in all circumstances." 109 S.Ct. at 2543.

As Chairman Brooks of the House Judiciary Committee, the House floor manager, explained, "[t]he committee determined that the Court's basis for striking down the Texas statute was that. . . [r]ather than safeguarding the physical integrity of the flag in all circumstances, the Texas statute made it a crime to abuse the flag in a manner that would 'seriously offend one or more persons. . .'" 135 Cong. Rec. H5500 (daily ed. Sept. 12, 1989). Since "the Court indicated that it would look differently on a content-neutral flag protection statute, . . . H.R. 2978 is designed to conform. . . by removing any language that is content specific. . . ." *Id.*

One leading proponent of the statutory approach was Representative William J. Hughes, a senior member of the Judiciary Committee and the Chairman of that Committee's Subcommittee on Crime. Representative Hughes authored one of the three statutory proposals that the Committee considered in drafting the House version of this legislation. In urging the Committee to follow the statutory route rather than the constitutional amendment route, Representative Hughes examined the extent and basis of the *Texas v. Johnson* opinion and concluded that "I believe we can restore protection to the flag by simple statutory changes. We do this by reading, and heeding, the Court decisions, not by denouncing them and desecrating the Court itself." *House Hearings* at 330. Representative Hughes warned the Committee that "the federal law on flag desecration [with its element that the defendant intend to "cast contempt" on the flag] is in even greater constitutional jeopardy than the Texas law." *Id.* at 331.

Representative Hughes based his belief that a statute was constitutionally feasible on two important Supreme Court precedents relied upon by *Texas v. Johnson*. The

Chairman of the Crime Subcommittee drew the attention of the Committee to this Court's decision in *United States v. O'Brien*, 391 U.S. 368 (1968), explaining "[p]erhaps most important in this regard is the 1968 draft card burning case. . . . O'Brien proclaimed at the time, and stated to the jury, that he [burned his draft card] to express his anti-war beliefs. In short, the facts of the case certainly provided the basis for a claim that the prosecution was aimed at the contents of his expression, not just conduct." *Id.* at 332-33. The Committee was urged to focus on "the rationale of the Court in *O'Brien*" as being "equally applicable to prosecutions under the proposed amended Flag Desecration Act." *Id.* at 333. Representative Hughes quoted the Court's description of the draft card burning statute: "It prohibits the knowing destruction of certificates issued by the Selective Service System, and there is nothing [necessarily] expressive about such conduct. The amendment [to the draft laws] does not distinguish between public and private destruction, and it does not punish only destructions engaged in for the purpose of expressing views." *Id.* at 334 (quoting *United States v. O'Brien*, 391 U.S. at 375). Based on *O'Brien*, Representative Hughes told the Committee that "a properly drafted statute would not be defeated by the infusion of an element of expression into the act of burning or other physical abuse of the flag." *Id.*

Additionally, Representative Hughes cited, in support of the statutory alternative, *Smith v. Goguen*, 415 U.S. 566 (1974), which directly addressed the government's interest in preserving the flag. Representative Hughes quoted from Justice White's concurring opinion in *Goguen*:

There is no doubt in my mind that it is well within the powers of Congress to adopt and prescribe a national flag and to protect the integrity of that flag. Congress may provide for the general welfare, control interstate commerce, provide for the common defense, and exercise powers necessary and proper for those ends.

These powers, and the inherent attributes of sovereignty as well, surely encompass the designation and protection of a flag. It would be foolish[ness] to suggest that the men who wrote the Constitution thought they were violating it when they specified a flag for the new nation.

. . . The United States has created its own flag, as it may. The flag is national property, and the nation may regulate those who would make, imitate, sell, possess, or use it.

I would not question those statutes which proscribe mutilating, defacement, or burning of the flag or which otherwise protect its physical integrity.

House Hearings at 336 (quoting *Smith v. Goguen*, 415 U.S. at 586-87 (White, J., concurring) (quotations omitted)). Then, Representative Hughes concluded his argument in favor of a statute:

As Justice White suggested, we have the right as a nation to establish a national flag, and we have done so. Surely the right to establish that flag carries with it the right to protect it from physical attack. And surely our right to protect it is not so limited and circumscribed that we as a nation must stand by impotently and tolerate the burning or other mutilation of our flag so long as the flag burner utters some expletive against the flag or our nation as he or she ignites it.

Id. at 336.

Representative Hughes's views prevailed, as the Committee, and in turn the House and Senate, determined to follow the statutory course based on the language of this Court's prior opinions. The Senate Judiciary Committee report concurred, focusing on the flag's "historic function" for such sovereign purposes as marking "our national presence in schools, public buildings, battleships and airplanes." S. Rep. No. 152, 101st Cong., 1st Sess. 2-3 (1989).⁴ Other legislative history similarly pointed out, as

⁴ The Senate report traced the original intent back to "the Founders," "the Continental Congress" and "[Chief Justice John] Marshall

the Senate floor manager, Chairman Biden, quoted Woodrow Wilson, "The flag is the embodiment, not of sentiment, but of history." 136 Cong. Rec. S7457 (daily ed. June 23, 1989).⁵

On this basis, Congress adopted the Act, which went into effect on October 27, 1989. That day, a flier was circulated in Seattle announcing plans to conduct a rally called a "Festival of Defiance." Events at the rally were filmed, with a videotape that was part of the record below; these events included defendants hauling down, and burning, the flag denoting the federal sovereign's facility of the Post Office building.⁶ The United States filed

and the men of his generation," as well as modern scholarly and political figures such as Woodrow Wilson. *Id.* (quoting Oliver Wendell Holmes regarding the generation of the Framers).

⁵ Other Members insisted that they "cannot envision the Members of the House and Senate in the First Congress that met in 1789, the Members who wrote those amendments. . . having in mind, even by the furthest stretch of the imagination, that the freedom of speech clause would ever be stretched to the extent" of barring Congress from any flag protection. 136 Cong. Rec. S8087 (daily ed. July 18, 1989) (Sen. Byrd). See, e.g., 136 Cong. Rec. S12593 (daily ed. Oct. 4, 1989) (Sen. Bumpers) (discussing what was meant by "James Madison and John Jay and Alexander Hamilton"); *id.* at S13721 (Sen. Dole) (discussing why "on June 14, 1777, the Continental Congress resolved to create an official — and distinctively — American flag"); *id.* at S13506-07 (Sen. Hatch) (discussing with respect to "James Madison and the other framers at the Philadelphia Convention. . . [that] [t]he framers of the Constitution and the first amendment would have been much more astonished by the proposition that the States lack power to protect the flag from desecration"). Many such statements were made during the debate over whether to adopt a constitutional amendment to protect the flag, a debate overlapping with whether to adopt the Act.

⁶ This appeal is taken from the district court's decision granting defendants' motion to dismiss Count II of the Information. The United States Attorney attached to the Information an affidavit by federal agents who were eyewitnesses with a videotape as the accompanying Exhibit A. Affidavit by Steven M. Dean and Stanley R. Pilkey (November 28, 1989), docket entry at Joint Appendix ("J.A.") 20; text at J.A. 36. The videotape consists of film by federal agents supplemented by film from news broadcasts. A transcript of the videotape has been filed with the district court.

an Information charging that the defendants "did knowingly burn a flag of the United States, to wit, the flag of the United States, which was the property of the United States Postal Service," in violation of 18 U.S.C. §700(a)(1) and (2).⁷ Defendants moved to dismiss that count, asserting that the Flag Protection Act was unconstitutional as applied to the facts. In response, the House and Senate *amici* appeared and joined in the defense of the Act. As the district judge recognized, House *amici* showed a basis for flag protection legislation in the original intent⁸ regarding the flag and national sovereignty:

the United States House of Representatives does not agree with defendants that the government's sole interest in protecting the physical integrity of the flag arises out of its symbolic value. Instead the House argues that Congress enacted the Flag Protection Act because it wished to shield the flag from harm as an incident of sovereignty with a specific legal significance apart from its symbolic value. . . and that protecting the flag protects that sovereignty interest.

J.S. at 12a. The Senate and House *amici* support each other, focusing on complementary aspects of the background and history.⁹

⁷ That was Count II. Count I charged destruction of federal property, namely, that the defendants "did willfully injure or commit a depredation against property of the United States and an agency thereof, to wit, a flag of the United States, which was the property of the United States Postal Service," in violation of 18 U.S.C. §§1361-62.

⁸ The district court recognized the House's strong showing of the sovereignty interest: "the House recounts the history of the use of the United States flag as an indicator of sovereignty, including numerous instances in which violations of the flag's physical integrity have been deemed threats to the sovereignty of this nation." Jurisdictional Statement ("J.S."), *United States of America v. Mark John Haggerty*, No. 89-1434 (filed March 13, 1990), at 12a.

⁹ "We rely on the brief *amicus curiae* submitted on behalf of the Speaker and the Leadership Group of the House of Representatives for further discussion of that power and the unique historical status of the flag." Memorandum of United States Senate As *Amicus Curiae*, *United States v. Haggerty*, (No. CR 89-315R filed Feb. 1, 1990), at 31 n. 60.

Although fully apprised of Congress's intent to follow *Texas v. Johnson's* physical integrity language, the district judge brushed that intent aside in a footnote, stating that "the Act fails to protect the flag's physical integrity" because "flying the flag in inclement weather or carrying it into battle, are not prohibited [by the Act]." J.S. at 12a n.6 (emphasis supplied). Congress's decision to comply with *Texas v. Johnson* thus never even received judicial recognition because the district judge equated this Court's language on physical integrity with forbidding the armed forces to carry the flag into battle — a suggestion without support in this Court's opinions, in the legislative history, or anywhere else.¹⁰

From the district court judgment of dismissal, the United States noted its appeal. Shortly thereafter, the United States District Court for the District of Columbia faced a similar challenge to the Act in *United States v. Eichman*, concerning a flag burning on the steps of the Capitol. The *Eichman* senior district judge largely repeated the Seattle case's opinion, which may appropriately be considered the principal case.

SUMMARY OF ARGUMENT

Congress justifiably adopted a statute which contrasted with the Texas "serious offense" provision struck down in *Texas v. Johnson* by providing content-neutral protection for the federal interest in the physical integrity of the flag. To uphold a statute regulating conduct (including the conduct of setting fire to an object to protest governmental policy), the Court has looked for an applicable

¹⁰ The suggestion that the government's admitted inability to protect, by statute or otherwise, the physical integrity of the flag against the ravages of either nature or war hardly can diminish the government's authority to protect the flag from the dangers that are within the province of governmental control. The statute does not condone the damage done to a flag in a storm by the forces of nature or, in a battle, by a foreign enemy. It merely recognizes that neither weather nor the gunfire of an enemy at war with the United States are susceptible to statutory control.

governmental interest apart from suppressing unpatriotic expression. *United States v. O'Brien*, 391 U.S. 367 (1968). In its series of flag opinions, particularly Justice Blackmun's key pronouncement in *Smith v. Goguen*, 415 U.S. 566, 590-591 (1974) (Blackmun, J., dissenting) (cited with approval, *Texas v. Johnson*, 109 S. Ct. at 2543 n.6), this Court recognized a number of governmental interests in flag protection, carefully setting aside as distinct the interest in neutrally "protecting the physical integrity of the flag in all circumstances." *Texas v. Johnson*, 109 S. Ct. at 2543. The Eighth Circuit's decision in *United States v. William Charles Cary, Jr.*, No. 88-5458, slip op. (8th Cir., filed Feb. 26, 1990), confirmed Congress's decision to comply by upholding 18 U.S.C. §700 against First Amendment challenge earlier this year.

Part II of this brief discusses the sovereignty interest in the flag as a matter of the original intent and understanding of the Framers, particularly James Madison, draftsman of the First Amendment. See, e.g., *Marsh v. Chambers*, 463 U.S. 783, 790-91 (1983). While the symbolic role of the flag is now well-established, the flag was an important incident of sovereignty before it was used for symbolic purposes by patriots and others. When the nation's founders first determined to adopt a national flag, they intended to serve specific functions relating to our status as a sovereign nation. Just as the English had protected their flag as part of maintaining sovereignty of the seas, *United States v. Maine*, 475 U.S. 89, 96 & n.11 (1986), rather than for viewpoint-suppressive purposes, so the Framers' adoption and protection of the flag were originally intended to obtain proper treatment for the United States as a sovereign nation. Notably, the Continental Congress's goal in its flag enactments was to secure protection for its citizens' rights, specifically the right of its seamen not to be hanged by the English.

A tradition had long developed of punishing flag defacers: "it has often occurred that insults to a flag have been the cause of war, and indignities put upon it . . . have

often been resented and sometimes punished on the spot." *Halter v. Nebraska*, 205 U.S. 34, 41 (1907). Madison ably articulated the sovereignty interest in the flag on four occasions — one flag-burning, two forced flag lowerings, and a flagpole-chopping — as did Jefferson on several occasions. In particular, Madison pronounced a protest flagburning in Philadelphia in 1802 an actionable violation of law, rather than some form of expression protected by the First Amendment. Plainly, the same Framers who adopted the First Amendment were those who expressed the original understanding of flag protection, and they considered the two to be entirely consistent.

The Framers' articulation of this original intent and understanding long precedes the later, derivative, symbolic interest, and demonstrates the historic consistency between flag protection and the First Amendment. Both Madison and Jefferson treat the flag in terms of its legal significance for sovereignty — not as the public may when it expresses values such as patriotism, or as the defendants may when they express their own values, but as a sovereign nation protects the incidents of its sovereignty. Protection of the flag has continued to serve the non-suppressive original intent from the Framers' time to the reflagging of the Kuwaiti vessels in the Persian Gulf in 1987. A notion that content-neutral protection of the flag requires a change in the Bill of Rights would have been to the Framers, as it remains today, anathema. This Court should uphold Congress's compliance with *Texas v. Johnson* through enactment of the Act.

ARGUMENT

I. CONGRESS COMPLIED WITH THIS COURT'S SUGGESTION TO PROTECT NEUTRALLY THE PHYSICAL INTEGRITY OF THE FLAG.

A. *This Court's Flag Opinions Recognize A Number of Government Interests, and Ask for An Applicable Interest Apart from Suppressing Unpatriotic Expression.*

When Congress enacted the Act, it drew upon extensive scholarly testimony in support, which marshalled this Court's powerful principles sustaining such legislation.¹¹ This Court has emphasized that the First Amendment protects "freedom of *speech*" rather than conduct.¹² Congress concluded "[t]he Supreme Court's symbolic speech cases therefore stand for the proposition that the government can regulate conduct with speech elements, as long as that regulation is 'content-neutral,' i.e., the government's purpose was not suppression of free expression." H.R. Rep. No. 231, *supra* p.2, at 7. In *United States v. O'Brien*, 391 U.S. 367 (1968), the defendant O'Brien burned a draft card on public courthouse steps in a protest against the Vietnam War, violating 50 U.S.C. App. §462(b)(3) by "knowingly destroy[ing]. . . any such [Selective Service] certificate." The Court upheld the prohibition on expressive burning because it did not depend on what the defendant expressed by the burning, even though Congress adopted it in disapproval of "defiant de-

¹¹ *House Hearings* at 48 (Professor Dellinger), 99 (Professor Tribe), and 445 (Professor Sunstein); *Senate Hearings* at 187 (Professor Stone).

¹² "The examples are many of the application by this Court of the principle that certain forms of conduct mixed with speech may be regulated or prohibited." *Cox v. Louisiana*, 379 U.S. 559, 563 (1965). In an expressive burning case, "'speech' and 'nonspeech' elements are combined in the same course of conduct," *United States v. O'Brien*, 391 U.S. 367, 376 (1968). *Texas v. Johnson* explained that "[t]he Government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word. See *O'Brien*, 391 U.S. at 376-77. . . ." 109 S.Ct. at 2540.

struction and mutilation of draft cards by dissident persons who disapprove of national policy." 391 U.S. at 387 (reprinting Senate committee report).¹³

The statute upheld in *O'Brien* was a 1965 amendment to the Universal Military Training and Service Act which, in response to a series of "protest" draft card burnings, made it illegal to destroy or mutilate a draft card. The House proponents of the bill expressed clearly their intention to address the potential injury to the nation from the protestors' expressions. Armed Services Committee Chairman Mendel Rivers explained that the bill was "a straightforward clear answer to those who would make a mockery of our efforts in South Vietnam by engaging in the mass destruction of draft cards. . . . This is the least we can do for our men in South Vietnam fighting to preserve freedom, while a vocal minority in this country thumb their noses at their own Government." 111 Cong. Rec. 19871 (1965). Representative Bray, the only other Member to substantially address the merits and rationale of the bill, stated that "[t]he need of this legislation is clear. Beatniks and so-called 'campus-cults' have been publicly burning their draft cards to demonstrate their contempt for the United States and our resistance to Communist takeovers." *Id.*

The Court amply demonstrated its adherence to the bedrock principle of presumed constitutionality of enactments of the people's elected federal representatives in upholding the draft card statute, the statements of the floor proponents notwithstanding. On the basis that there was a governmental interest, administrative convenience,

¹³ For example, in *Schacht v. United States*, 398 U.S. 58, 60 (1970), the Court struck down the statutory prohibition on wearing an army uniform in a "theatrical. . . portrayal" that "tend[s] to discredit th[e] armed force[s]," 10 U.S.C. § 772(f), because the prohibition aimed to suppress the viewpoint that the defendant's conduct expressed ("discredit"). By comparison, *Schacht* noted that a neutral statute that in all circumstances "mak[es] it an offense to wear our military uniforms without authority," would be "standing alone, a valid statute on its face," *id.* at 61, even when applied to expressive conduct.

unrelated to the suppression of expression, which was served by the prohibition on draft card burning, the *O'Brien* Court upheld the statute.

As Justice Blackmun has written, the Court has "often approved restrictions of that kind provided that they are justified without reference to the content of the regulated speech. . . ." *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976) (emphasis added) (citing *United States v. O'Brien*, 391 U.S. 367, 377 (1968)). The Court has followed Justice Blackmun's reasoning numerous times in declining to strike down "expressive conduct" statutes, whether the conduct be picketing of an abortionist's residence, homeless sleep-ins in Lafayette Park, or other expressive conduct.¹⁴ *San Francisco Arts & Athletics Inc. v. United States Olympic Committee*, 483 U.S. 522 (1987), upheld protection of the Olympic flag and logo (described at 526, 533, and 540-41) from infringement, approving such "restrictions on expressive speech" as legitimately a part of the "congressional purpose of encouraging and rewarding the [Olympic] activities." 483 U.S. at 536-37 (citing *United States v. O'Brien*).

In particular, Congress relied on the Court's flag opinions, which recognize a range of government interests, some content-related, others, notably the physical integrity interest, content-neutral. In *Street v. New York*, 394 U.S. 576, 590 (1969), in which defendant accompanied his flag-burning by the speech that "'if they let that happen to [James] Meredith we don't need an American flag,'" the Court found "four governmental interests":

- (1) an interest in deterring. . . incit[ement to] to commit unlawful acts; (2) an interest in prevent-

¹⁴ *Frisby v. Schultz*, 108 S.Ct. 2495 (1988) (picketing abortionist's home); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 296 (1984) (homeless sleep-in); *Ward v. Rock Against Racism*, 109 S. Ct. 2746, 2754 (1989) (citing numerous precedents); *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) (upholding ordinance "justified without reference to the content"); *Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 49 & n.9 (1983).

ing. . . uttering words so inflammatory that they would provoke others. . . ; (3) an interest in protecting the sensibilities of passers-by who might be shocked by appellant's words about the American flag; and (4) an interest in assuring. . . proper respect for our national emblem.

394 U.S. at 590-91.

Smith v. Goguen, 415 U.S. 566 (1974), a Massachusetts prosecution for wearing a flag on the seat of the pants, focused on several interests arguably at issue, and included this Court's crucial identification of a distinct interest in the physical integrity of the flag. Justice Blackmun offered an opinion of particular importance because it was subsequently approved by the Court, as discussed below, in *Texas v. Johnson*, 109 S. Ct. at 2543 n.6, and then served as the major basis for Congress's enactment of the Act. The opinion by Justice Blackmun concluded that Massachusetts "has necessarily limited the scope of the statute to protecting the physical integrity of the flag," and stated that "I, therefore, must conclude that Goguen's punishment was constitutionally permissible for harming the physical integrity of the flag. . . ." 415 U.S. at 591 (Blackmun, J., dissenting) (emphasis added).¹⁵ Similarly, in *Spence v. Washington*, 418 U.S. 405 (1974), a prosecution for attaching a peace symbol to the flag, the Court noted no fewer than five governmental interests.¹⁶ The Court might well have upheld a statute protecting the ultimate interest in "physical integrity," but concluded that interest did not pertain, since the defendant did

¹⁵ Justice White's concurring opinion linked the interest in "protect[ing] the integrity of that flag" to how "the inherent attributes of sovereignty. . . surely encompass the designation and protection of a flag." *Id.* at 586-87.

¹⁶ These were to (1) "prevent[] breach of the peace," (2) "protect the sensibilities of passersby," (3) "punish for failing to show proper respect for our national emblem," (4) prevent what "might be taken erroneously as evidence of governmental endorsement," and (5) the "interest the State may have in preserving the physical integrity of a privately owned flag." 418 U.S. at 412-15.

not "permanently disfigure the flag or destroy it." *Id.* at 581.

B. *Congress Complied With Texas v. Johnson, Adopting an Act Which Differs Sharply from the Texas Provision Based on "Serious Offensiveness."*

In sum, this Court's "expressive conduct" cases in general and its flag cases in particular tend to uphold conduct-regulating statutes, even those which in particular cases impinge on expressive conduct, so long as the statutes impose a content-neutral prohibition. Yet as described above, the district court refused to acknowledge Congress's intent to comply with these principles. *Texas v. Johnson* had given great weight to Texas's expressly declared intent to prohibit expression of an "offensive" viewpoint, and Texas's expressly declared interests in suppressing expression causing "offense." "Johnson was prosecuted because he knew that his politically charged expression would cause 'serious offense.'" *Id.* at 2543 (quoting Texas provision).¹⁷

This Court did not reach, but rather carefully preserved, the wholly different question, as in *O'Brien*, of a content-neutral statute protecting the physical integrity of the object, draft card or flag, which someone wants to burn and the government wants to protect. In this Court's vitally important language, "The Texas law is thus not aimed at protecting the physical integrity of the flag in all circumstances, but is designed instead to protect it only against impairments that would cause serious offense to others. ⁶ Texas concedes as much. . . ." 109 S.

¹⁷ Texas's governmental interest "depend[s] on the onlookers' reaction to the flag-burning," as the prosecution proved at Johnson's trial "by offering the testimony of persons who had in fact been seriously offended by Johnson's conduct," *id.* at 2543 n.7, and as further emphasized by the interests argued by Texas in this Court in avoiding violence by "an audience that takes serious offense at particular expression" and avoiding the particular "serious offense" felt by watchers of flag desecration. *Id.* at 2541-42.

Ct. at 2543. Footnote 6 in *Texas v. Johnson* pays homage to Justice Blackmun's position on this key point of the flag's physical integrity: "Cf. *Smith v. Goguen*, 415 U.S., at 590-591 (BLACKMUN, J., dissenting) (emphasizing that lower court appeared to have construed state statute so as to protect physical integrity of the flag in all circumstances). . . ." 109 S. Ct. at 2543 n.6 (emphasis added). In endorsing and incorporating Justice Blackmun's views, Justice Brennan, who wrote the opinion for the five-justice majority in *Texas v. Johnson*, visibly avoided his prior objection to protection of the physical integrity of the flag, by dropping the part of his previous opinion criticizing statutes protecting the flag's physical integrity.¹⁸

When Congress received scholarly testimony and studied this matter, it paid the most acute attention to *Texas v. Johnson*'s reasoning in relying on Justice Blackmun's signal pronouncement. The House Judiciary Report attentively quotes and explains the Court's language,¹⁹ provid-

¹⁸ When Justice Brennan wrote *Kime v. United States*, 459 U.S. 949 (1982) (Brennan, J., dissenting from denial of certiorari), he recognized the difference between Texas-type non-neutral statutes, and statutes protecting physical integrity. A non-neutral statute was "different from one that simply outlawed any public burning or mutilation of the flag, regardless of the expressive intent or nonintent of the actor." *Id.* at 954-55 (Brennan, J., dissenting). In *Kime*, as a mere dissenter, he gave an "entirely independent reason," *Id.* at 954, to strike down those "different" statutes protecting physical integrity. Reading *Kime* together with *Texas v. Johnson*, Justice Brennan still recognized that statutes protecting physical integrity were different, and now was prepared, on behalf of a majority of the Court, to recognize the full magnitude of that difference by citing approvingly Justice Blackmun's opinion in *Smith v. Goguen* that a physical integrity statute was constitutional.

¹⁹ The House Judiciary Committee report on the bill explains that "[t]he Texas law is thus not aimed at protecting the physical integrity of the flag in all circumstances, but is designed instead to protect it only against impairments that would cause serious offense to others," H.R. Rep. No. 231, *supra* p.2, at 8 (quoting *Texas v. Johnson*). Similarly, the Senate Judiciary Committee Report explained at length its in-

Continued

ing the following description of the "Purpose of the Bill as Amended":

The purpose of H.R. 2978, as amended, is to protect the physical integrity of American flags against burning, mutilation, defacing or trampling upon. The bill responds to the Supreme Court decision in *Texas v. Johnson* by amending the current Federal flag statute to make it content-neutral: that is, the amended statute focuses exclusively on the conduct of the actor, irrespective of any expressive message he or she might be intending to convey. The bill serves the national interest in protecting the physical integrity of all American flags in all circumstances.

H.R. Rep. No. 231, *supra* p.2, at 2. Congress made every aspect of the statute consistent with the intent to comply with *Texas v. Johnson*.²⁰

C. *The Eighth Circuit Confirmed Congress's Decision to Comply by Upholding 18 U.S.C. §700 this Year in United States v. Cary.*

In the year since Congress enacted the Act, the Eighth Circuit confirmed the soundness of Congress's decision to comply with *Texas v. Johnson* by upholding 18 U.S.C. §700 in *United States v. William Charles Cary, Jr.*, No. 88-5458 slip op. (8th Cir., filed Feb. 26, 1990). In *United*

tention to "Protect the Physical Integrity of the Flag in a Manner that Accords with 'Texas' v. 'Johnson,'" S. Rep. No. 152, *supra* p.5, at 4 (heading for section on pp. 4-6), and its intention to adopt a statute which was content-neutral and thereby constitutional, *id.* at 9-15.

²⁰ Consistent with that intent, prosecutions pursuant to the Federal Flag Act do not "depend on the onlookers' reaction," *id.* at 2543 n.7, and "the testimony of persons who had in fact been seriously offended," *id.*, would not have the role it did in Johnson's trial. The Act does not collect various objects likely to inspire, by mistreatment, the feeling of "serious offense" in an audience the way the Texas provision applied to gravesites, state buildings, chapels, historic sites, and state flags. "Offense," let alone "serious offense," is no element. The Act proscribes actions defined by their effect on the flag without reference to any audience. No audience is needed, and the viewpoint of any audience does not matter.

States v. Cary, the defendant Cary burned a United States flag in Minneapolis in 1988, during a confrontation similar to the one in *United States v. Haggerty* in Seattle in 1989. A district court convicted Cary for burning the flag in violation of 18 U.S.C. §700,²¹ and the Eighth Circuit affirmed the conviction, with the entire "issue presented on appeal [being] whether the Supreme Court's recent opinion in *Texas v. Johnson*, 109 S.Ct. 2533 (1989), which held the Texas flag desecration statute unconstitutional as applied, mandates that we reverse Cary's conviction." Slip op. at 2-3 (footnotes omitted).

The Eighth Circuit noted that *Texas v. Johnson* did not invalidate all flag protection statutes, only those aimed at suppressing particular messages like the Texas provision. It concluded that, for 18 U.S.C. §700, the government had a valid interest "unrelated to the suppression of expression," *id.* at 10 (footnote omitted), because "the government's interest" concerned "Cary's means," namely, his burning the flag in those circumstances, not "the message itself." *Id.* at 12.

As the Eighth Circuit explained, a "conviction [can be] based upon a federal statute which, unlike its Texas counterpart, does not require as an element of the crime that his expressive conduct offend third parties. Furthermore, there is no evidence in the record that anyone on the scene was even offended by Cary's actions or his message." *Cary*, slip op. at 12. The government's interest "on these facts is not related to suppressing debate or disputes between opponents nor does it offend the First Amendment's high purpose. . . ." *Id.* at 12-13. *Cary* sustained 18 U.S.C. §700 because "[t]he federal government's interest in this case, however, does not blossom *only* when a person's treatment of the flag communicates some message. They also arise when the burning is a simple act of

²¹ The United States prosecuted Cary pursuant to 18 U.S.C. §700 prior to amendment by the Flag Protection Act of 1989. The statutory amendment was considered by the Eighth Circuit and does not diminish the validity of its reasoning. Slip op. at 10 n.18.

vandalism. . . . Suppression of the expressive element was only incidental. . . [since the government's] interest exists independent of whether the flag burning communicated any message. Therefore, the conviction can be upheld if the government can meet the *O'Brien* test." *Cary*, slip op. at 14.

Since the Seattle case, *United States v. Haggerty*, presents overwhelming persuasion that the Flag Protection Act serves a governmental interest unrelated to expression, the Court can and should approve 18 U.S.C. §700 on its face and as applied to *Haggerty*. The *Haggerty* Information sets forth, in its charge of violation of 18 U.S.C. §700, that the defendants burned a flag which was "property of the United States Postal Service." Count II of the Information, J.A. at 35. The *Haggerty* defendants attribute no significance to their having tore down and burned, not their own flag, but a flag posted over the federal building. However, as this Court flatly declared, "[w]e have no doubt that the State or national Governments constitutionally may forbid anyone from mishandling in any manner a flag that is public property." *Spence v. Washington*, 418 U.S. 405, 409 (1974).²²

Cary reasoned that *Texas v. Johnson* left Congress free to enact a flag protection act, like the *O'Brien* draft card burning statute, that forbids that kind of conduct without

²² This is not to suggest that burning of a flag that is privately owned involves a government interest of suppression. "A person may 'own' a flag, but ownership is subject to special burdens and responsibilities. A flag may be property, in a sense; but it is property burdened with peculiar obligations and restrictions." *Street v. New York*, 394 U.S. 576, 617 (1969) (Fortas, J., dissenting); see *id.* at 605 (Warren, C.J., dissenting) ("I believe that the States and the Federal Government do have the power to protect the flag from acts of desecration and disgrace"); *id.* at 610 (Black, J., dissenting) ("It passes my belief that anything in the Federal Constitution bars a State from making the deliberate burning of the American flag an offense"); *House Hearings* at 140 (Prof. Tribe) (there is "a sense of injury to the Nation whenever any flag, regardless of its technical ownership, is burned").

regard to viewpoint. Thus, *Cary* confirmed Congress's sound decision to comply with *Texas v. Johnson*.

II. THE FOUNDERS' ORIGINAL INTENT SHOWS CONGRESS'S LEGITIMATE INTEREST IN "THE PHYSICAL INTEGRITY OF THE FLAG" AS AN INCIDENT OF SOVEREIGNTY.

Both district courts acknowledged the House *amici*'s argument for the sovereignty interest in the physical integrity of the flag. "[T]he House's [brief] conten[d]ed that flying the flag to claim sovereignty has a concrete legal purpose and that protecting the flag protects that sovereignty interest." J.S. at 12a. However, the district judge rejected that interest as illegitimate, insisting that "even if Congress does seek to prevent harm to the flag as an incident of *sovereignty*, that interest *relates to the suppression of expression* and is subject to strict scrutiny." *Id.* (emphasis added and footnote omitted). Defendants similarly admitted²³ the sovereignty interest but branded it illegitimate.

In so holding, the district judge, like the defendants, fundamentally erred. When the defendants attempt to characterize the flag as a symbol alone, and the government as having only illegitimate ideological and suppressive interests, they fail to acknowledge that those who both framed the First Amendment and adopted the flag had an original purpose for the flag quite unrelated to ideology or its control. Symbolic interests on which defendants base all their arguments developed only later,

²³ Defendants failed to dispute the historic material presented by the House *amici*, acknowledging what they term House *amici*'s "rich historic detail" showing "that the flag is an 'incident of sovereignty'" and admitting "all of the examples offered, from John Endecott's desecration of the British flag in 1634, H.R. Mem. at 18, to James Madison's description of the 'insult' and 'indignity' communicated when the British ship *Leopard* forced the American frigate *Chesapeake* to lower its flag, H.R. Mem. at 28, to the Supreme Court's recognition in *United States v. Maine*, 475 U.S. 89 (1986). . . ." Defendants' Reply Memo. in Support of Motion to Dismiss, *United States v. Haggerty*, No. CR 89-315 at 17-18 (filed Feb. 7, 1989).

derivatively — after the Framers cast the First Amendment consistent with their belief that the government could protect the physical integrity of the flag.

A. *Original Understanding And Intent Should Guide Constitutional Consideration, Particularly Concerning the Flag as an Incident of Sovereignty.*

The original intent of the Framers who actually wrote the Bill of Rights provides unique and powerful guidance; it is "contemporaneous and weighty evidence of its true meaning." *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 297 (1888). As the Court discussed in upholding the constitutionality of legislative chaplains in *Marsh v. Chambers*, 463 U.S. 783 (1983), "historical evidence sheds light not only on what the draftsmen intended the [First Amendment] to mean, but also how they thought [it] applied to the practice authorized by the First Congress—their actions reveal their intent." *Id.* at 790. This Court has given the greatest weight to the pronouncements of James Madison, as drafter of the First Amendment and its manager on the floor of the First Congress. *Id.* at 788 & n.8, and sources cited (Madison is among "the men who wrote the First Amendment"). "This Court has previously recognized that the provisions of the First Amendment [were ones] in the drafting and adoption of which Madison and Jefferson played such leading roles. . . ." *Everson v. Bd. of Education*, 330 U.S. 1, 13 (1947).²⁴

Examination of original intent has special importance in a matter — the flag — for which this Court seeks an objective criterion for judicial review of Acts of Congress.

²⁴ "The Amendment was proposed by James Madison on June 8, 1789, in the House of Representatives." *McGowan v. State of Maryland*, 366 U.S. 420, 440 (1961). "James Madison [is] the author of the First Amendment." *Engel v. Vitale*, 370 U.S. 421, 436 (1962). "James Madison was then a leader in the House, as he had been in the [Constitutional] Convention," *Myers v. United States*, 272 U.S. 52, 115 (1926) (reciting and following Madison at 111-13, 115-117, 118, 119, 120-21, 123, 125-26, 128-29, and 131).

In his opinion concurring in *Texas v. Johnson*, Justice Kennedy noted the strong values at issue: that this was "one of those rare cases" in which to "pause to express distaste for the result," noting the decision's "personal toll" and how "painful this judgment is to announce." 109 S. Ct. at 2548 (Kennedy, J., concurring). Justice Kennedy expressed agreement with the dissent "that the flag holds a lonely place of honor in an age when absolutes are distrusted and simple truths are burdened by unneeded apologetics." *Id.* In this context of strong values, original intent provides an objective polestar, as one Justice recently expressed persuasively. Justice Scalia wrote only last year: "Now, the main danger in judicial interpretation of the Constitution — or, for that matter, in judicial interpretation of any law — is that the judges will mistake their own predilections for the law. . . . Originalism does not aggravate the principal weakness of the system, for it establishes a historical criterion that is conceptually quite separate from the preferences of the judge himself." Scalia, *Originalism: The Lesser Evil*, 57 Cinn. L. Rev. 849, 863-64 (1989).

Turning to a definition of the sovereignty interest as the Framers understood it, the law must take sovereignty — a legal matter of enormous importance, like "intellectual property" (trademarks, copyrights, and patents) or the "artificial person" of the corporation — and concretize it in incidents or instruments with practical legal application. Pure abstractions cannot be infringed or injured by physical acts, and hence cannot be protected, but intellectual property and corporations, having received concretization, can.

Sovereignty is concretized through its incidents. "The word 'nation' as ordinarily used presupposes or implies an independence of any other sovereign power more or less absolute, an organized government, recognized officials, a system of laws, definite boundaries and the power to enter into negotiations with other nations." *Montoya v. United States*, 180 U.S. 261, 265 (1901) (discussing legal

status of Indian tribe). Absent sovereignty and its incidents, government is "nothing more than a temporary submission to an intellectual or physical superior," *id.* at 265.²⁵ See, e.g., *Fong Yue Ting v. United States*, 149 U.S. 698, 711 (1893) ("The United States are a sovereign and independent nation. . . . The only government of this country, which other nations recognize or treat with, is the government of the Union; and the only American flag known throughout the world is the flag of the United States"). "It is also a historical fact that flags, including ours, have played an important and useful role in human affairs," *Smith v. Goguen*, 415 U.S. at 587 (White, J., concurring). The D.C. Circuit upheld 18 U.S.C. §700 because "the power to enact such [flag protection] legislation is an incident of sovereignty which inheres in the Government of the United States of America as a nation and which the Constitution recognizes and implements." *Joyce v. United States*, 454 F.2d 971, 985 (D.C. Cir. 1971) (emphasis added), *cert. denied*, 405 U.S. 969 (1972).²⁶

The original intent and understanding of the Framers has always underlain the sovereignty interest. Justice White's concurrence in *Smith v. Goguen*, 415 U.S. at 586, declared: "[i]t would be foolishness to suggest that the men who wrote the Constitution thought they were violating it when they specified a flag for the new Nation, Act of Jan. 13, 1794, 1 Stat. 341, c.1, just as they had for

²⁵ Regarding incidents of sovereignty, see, e.g., *Stern v. United States Gypsum, Inc.*, 547 F.2d 1329, 1338 (7th Cir. 1977) ("[p]rotection of federal officials. . . is but a necessary incident of sovereignty"); *United States v. State of Texas*, 695 F.2d 136, 141 (5th Cir. 1983) ("exclusive jurisdiction over federal enclaves. . . is an incident of sovereignty"). Regarding the sorting of sovereignty claims, see, e.g., *Pan American World Airways, Inc. v. Aetna Casualty & Surety Co.*, 505 F.2d 989, 1009-1015 (2d Cir. 1974); *Holiday Inns v. Aetna Insurance Co.*, 571 F. Supp. 1460, 1500-01 (S.D.N.Y. 1983), and cases cited.

²⁶ This Court cited approvingly both 18 U.S.C. §700 and *Joyce v. United States* when explaining that "Certainly nothing prevents a legislature from defining with substantial specificity what constitutes forbidden treatment of United States flags." *Smith v. Goguen*, 415 U.S. 566, 582-83 & n.30 (1974).

the Union under the Articles of Confederation. 8 Journals of the Continental Congress 464 (June 14, 1777);" accordingly, "[Congress's] powers, and the inherent attributes of sovereignty as well, surely encompass the designation and protection of a flag." *Id.* Similarly, *Halter v. Nebraska*, 205 U.S. 34, 41 (1907) (discussed approvingly in *Texas v. Johnson*)²⁷ also took original intent — "it would have been extraordinary if the Government had started this country upon its marvelous career without giving it a flag. . . ." — as underlying the sovereignty interest — the flag as an instrument of "National sovereignty" relating to "the existence and sovereignty of the Nation." As noted above, the legislative history of the Act drew on the various exponents of the sovereignty interest from "the Founders" and the Continental Congress to Woodrow Wilson. All this necessitates scrutiny of the original adoption and protection of the flag.

B. *Adoption and Protection of the Flag Were Originally Intended to Obtain Proper Treatment as a Sovereign Nation.*

The Framers' adoption and protection of the flag served a practical interest quite apart from suppression of unpatriotic viewpoints: the interest in obtaining proper treatment for the country and its citizens. Chief Justice Rehnquist noted this practical interest. "One immediate result of the flag's adoption was that American vessels harassing British shipping [during the Revolutionary War] sailed under an authorized national flag. Without such a flag, the British could treat captured seamen as pirates and hang them summarily; with a national flag, such

²⁷ *Texas v. Johnson* stands by *Halter v. Nebraska* as one of "our precedents" to be followed. 109 S.Ct. at 2545 (citing *Halter*). "Our decision in *Halter v. Nebraska*, 205 U.S. 34 (1907), addressing the validity of a state law prohibiting certain commercial uses of the flag, is not to the contrary" to *Texas v. Johnson* itself. 109 S.Ct. at 2545 n.10 (emphasis added). Other of *Halter's* positions may be valid, simply for "purely commercial rather than political speech. 205 U.S. at 38, 41, 42, 45." *Id.*, 109 S.Ct. at 2545 n.10.

seamen were treated as prisoners of war." *Texas v. Johnson*, 109 S. Ct. at 2549 (Rehnquist, J., dissenting). An eminent historian, Barbara W. Tuchman, discussed precisely that concrete legal and historical situation, explaining the Founders' adoption of the flag as part of sending forth a navy. "A flag was as necessary as commodore or crew, for a national navy was nothing without it. . . . [F]or a ship on the trackless seas it was a necessity as a sign of identity so that it should not be taken for a pirate." B.W. Tuchman, *The First Salute* 47 (1988). In other words, both the Chief Justice and Tuchman point to the eminently practical legal aspect of the flag, as an incident of sovereignty, to describe the actual historical adoption of the flag — not ideology, patriotism, or suppression of viewpoints.

Understanding this original intent requires recapitulating the flag's historical legal background, which this Court discussed in analyzing colonial-era "assertion of sovereignty over Nantucket Sound" under "international law" (as that background affects the current title to the Sound). *United States v. Maine*, 475 U.S. 89, 96 & n.11 (1986). As the Court noted, from the thirteenth century on, England maintained its sovereignty over particular bodies of water through a requirement that ships salute the English flag: ²⁸ "in general the formal requirement of the salute to the flag was maintained. . . . [T]he requirement of the flag ceremony was ended in 1805." *Id.* at 97 n.11 (quotation omitted).

²⁸ *United States v. Maine* quotes at length from L. Brownlie, *Principles of Public International Law* (2d ed. 1973), which cites, at 233 n. 3, "For the history see [T.W.] Fulton, *The Sovereignty of the Sea: An Historical Account . . . with Special Reference to the . . . Naval Salute* (1911)." Fulton explains the flag salute as follows: "the custom of lowering the top-sails and striking the flag" had its "earliest indication. . . [in] the much-discussed ordinance which King John issued in 1201." *Id.* at 6-7. See J. Selden, *Of the Dominion, Or, Ownership of the Sea* 401-02 (1972 reprint of 1652 ed.) (classic treatise quoting King John's law).

England enforced this "requirement of the flag ceremony" with the Dutch and French by war. Three Dutch-English wars occurred, with a sovereignty interest in the flag as chief causes, until "the accession of William of Orange to the English throne in 1689 [ended] English disputes with Holland." *United States v. Maine*, 475 U.S. at 97 n.11. Thereafter, English "sovereignty of the sea was still asserted against France" again through the "requirement of the flag ceremony," *id.*, enforced by war.²⁹ This enormously serious background — of wars fought for protection of a sovereignty interest projected by the flag — remains familiar in law today, such as in the reflagging in the Persian Gulf in 1987, as discussed below.

Thus, the Framers inherited a legal tradition of the flag's protection as a practical instrument affecting title to areas of land and water, rights of trade and citizenship, causes of war citable in international law, and similar matters with the utmost weight. Chief Justice Rehnquist and Tuchman quite correctly note that the British insistence on hanging American rebel seamen as pirates³⁰ necessitated American flag adoption and protec-

²⁹ Fulton, *supra* n.28, at 12-13 (Dutch admiral's "refusal to lower his flag . . . precipitated the first Dutch War."); *id.* at 15 (same for third war). See B. Cumberland, *History of the Union Jack* 119-27 (2d ed. 1900). "Louis XIV, however, gave his officers strict orders to refuse to perform the [flag] ceremony, and in the Declaration of War in 1689 William III [of England] made this one of his chief complaints against that monarch." T.C. Wade, Introductory Essay, in J. Borroughs, *The Sovereignty of the British Seas* (1920 ed.), at 34-35 (footnote omitted).

³⁰ G.H. Preble, *History of the Flag of the United States of America* 237 (1880) (quoting original English letter showing English belittling of colonial flag and claims of sovereignty). "England considered as pirates all those not sailing under an established flag, and the usual punishment for proven pirates was death on the gibbet." Rankin, *The Naval Flag of the American Revolution*, 11 Wm. & Mary Q. 339, 340 (1954) (footnote omitted). The English captured American privateers flying non-sovereign flags, *id.* at 227, and treated them as pirates, impeding recruitment. L. Lorenz, *John Paul Jones* 55 (1943) (Jones explains that officers refused commissions; they did "not choose to be hanged"); *id.* at 151-52 (Jones describes how "the Parliament of Eng-

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tion; the law and the practical understanding of sovereignty linked the flag to sovereignty status above the piratical. See *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 161 (1820) (treating a ship without the "protection of the flag" as a pirate).

Accordingly, the Continental Congress had sound legal and practical reasons to tie closely its establishing and protecting the sovereign flag to its establishing a navy. The Continental Congress did so in several enactments,³¹ including officially adopting the Stars and Stripes by the famed ordinance "Resolved, That the flag of the thirteen United States be thirteen stripes alternate red and white; that the union be thirteen stars, white in a blue field, representing a new constellation." VIII J. Continental Cong. 464 (June 14, 1777). "It was necessary to provide an authorized national flag. . . for England considered armed [American] vessels without such a flag as pirate ships and hanged their crews when they captured them. So the Marine Committee of the Second Continental Congress presented the Resolution, which was on the subject

land had authorized George III to consider and to treat all Americans taken at sea who were armed as traitors, pirates, and felons," and how "[n]ever before had history furnished us the example of a people arrogant enough to assume sovereignty with such deliberate cruelty").

³¹ On October 13, 1775, the Continental Congress appointed a Naval (later Marine) Committee, with authority to purchase and equip four armed ships, aboard which John Paul Jones hoisted the first sovereign flag (the "Grand Union") on December 3, 1775. B. Tuchman, *supra* p.25, at 46-48. On October 29, 1776, the Continental Congress adopted the resolve which reserved sovereign flags to the official navy ships. VI J. Continental Cong. 909 (Oct. 29, 1776); G.H. Preble, *supra* n.30, at 245. When Jones confronted a Captain Thomas Truxton acting disobediently to this resolve, much like the case of *The King v. Barnes* discussed below, Jones rebuked him for "flying in the Face of a positive Resolution of Congress" and for violating "the Flag and Sovereignty of the United States." Letter from John Paul Jones to Thomas Truxton (Oct. 24, 1780) reprinted in Peter Force Collection of John Paul Jones Letters and Documents 1244 (available in Manuscript Division, Library of Congress).

of the Navy,"³² adopting that resolution when it dispatched John Paul Jones, leader of the navy, aboard the *Ranger*.³³ Naturally, the Continental Congress tied enactments and reports on the navy's effectiveness to the sovereignty interest in the flag.³⁴

Moreover, the new navy's activities successfully generated flag sovereignty issues useful to the key Framers, Benjamin Franklin and John Adams, who were ministers to the French and Dutch.³⁵ For example, an American

³² T.C. Jones, *So Proudly We Hail: keystones of American Freedom* 55 (1981).

³³ On June 14, 1777, the Continental Congress adopted two resolves: "Resolved, That the flag of the thirteen United States be [the Stars and Stipes]," and "Resolved, That Captain John Paul Jones be appointed to command the ship *Ranger*." VIII J. Continental Cong. 464, 465 (June 14, 1777). "[T]he Flag Resolution came from the Marine Committee and the flag it described became known as the 'Marine Flag.'" S.M. Guenter, *The American Flag, 1777-1924* 34 (1990). Historians tie the flag resolution to the other naval business from the Marine Committee taken up by the Continental Congress that day. G.H. Preble, *supra* n.30, at 260; M.M. Quaife, *The Flag of the United States* 67 (1942); W. Smith, *The Flag Book of the United States* 55 (1975 rev. ed.); J.H. Sherburne, *The Life and Character of John Paul Jones* 39 (1851) ("connexion" with *Ranger*).

³⁴ A Board of Admiralty heard from Benjamin Franklin about Jones' actions "under American Commissions and Colours," A.H. Smyth, 8 *The Writings of Benjamin Franklin* 226 (1907); that Board reported to the Continental Congress that Jones "hath made the Flag of America respectable among the Flags of other nations," through his "Squadron under the Flag and Laws of these States." XIX J. Continental Cong. 320 (Mar. 28, 1781). The Continental Congress thereupon enacted a resolution regarding how Jones "hath supported the honor of the American flag." *Id.* at 386 (Apr. 13, 1781).

³⁵ "The number of letters written by Franklin directing naval operations made him virtually an overseas Secretary of the Navy. His letters contained constant references to the 'American Flag.'" Rankin, *supra* n.30, at 350. For Franklin's and Adams' role vis-a-vis John Paul Jones, see, e.g., 7 A.H. Smyth, *supra* n.34, at 157-58 (Franklin offer to Jones of "the commission and flag of the United States"); *id.* at 249 (Jones hopes "never to tarnish the honour of the American Flag"); *id.* at 297 (Franklin's offer to Jones of "an American Expedition, under the Congress' Commission and Colours"); 8 *id.* at 66 (Jones "under

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flag integrity incident served to make the Dutch our ally in the war with the English in 1780.³⁶ Thus, the original intent and understanding regarding the flag plainly consisted of sovereignty concerns of high importance, not ideology or viewpoint suppression which the defendants erroneously claim to be the sole possible governmental interest.

C. *Madison's and Jefferson's Views Establish the Consistency, as a Matter of Original Intent and Understanding, Between the First Amendment and Flag Protection.*

Along with the foregoing interactions among nations, a tradition had long developed of punishing flag defacers: "it has often occurred that insults to a flag. . . and indignities put upon it. . . have often been resented and sometimes punished on the spot." *Halter v. Nebraska*, 205 U.S. 34, 41 (1907). The Framers' part in this tradition demonstrates the historic core of consistency between flag protection and the First Amendment. That tradition developed from pre-Framer adjudications and incidents which

American Commission and Colours"); *id.* at 78 (Franklin reports to Congress that Jones "has done great honour to the American flag"); *id.* at 102 (Franklin questioning whether the Dutch complain of "a violation of the Flag of their Nation"); Lorenz, *supra* n.30, at 496 (Adams in 1782 envisaging "ships of the line under the American flag and commanded by Paul Jones"). See also 27 *The Papers of Benjamin Franklin* 525 (C.A. Lopez ed. 1988) (letter of Oct. 9, 1778 that Sicily "hath ordered the ports of [its] Dominions to be open to the Flag of the United States of America."); 7 A.H. Smyth, *supra* n.34, at 74 (Franklin advising American captains "to avoid giving any offence to Flaggs of Neutral powers, and to shew them proper marks of Respect and Friendship.").

³⁶ John Paul Jones' extraction of a flag salute figured as a cause of war with Holland. B. Tuchman, *supra* p.24, at 92. In Parliament's debate on the declaration of war, Lord North denounced the Dutch for "saluting a rebel privateer at St. Eustatia," 21 Parl. Hist. Eng. 1081 (1780); the English had demanded from the Dutch "a formal disavowal of the salute by Fort Orange, at St. Eustatia, to the rebel ship," *id.* at 1080 n.* (quoting diplomatic demand), since Jones' ship was "under the American flag." *Id.* at 960 n.*

set the stage for Madison's pronouncements. "From the earliest periods in the history of the human race, banners, standards and ensigns have been adopted," *Halter v. Nebraska*, 205 U.S. at 41. In America, the tradition that "insults to a flag. . . and indignities put upon it. . . [are] sometimes punished," *id.*, 205 U.S. at 41, started with one of the earliest prosecutions in American history: *Endecott's Case*.

In the 1600s, just as England had proceeded against those who failed to treat properly the flag,³⁷ so Massachusetts colonists prosecuted, tried, and convicted a domestic defacer of the flag in 1634. "John Endecott, who was to become governor of Massachusetts ten years later, cut part of the cross from the flag at Salem. Formal complaint was entered that the flag had been defaced by Endecott. . . ." 9 *Encyclopedia Britannica* 402 (1972) (article on "Flags"). A contemporary governor's account explains "that the ensign at Salem was defaced," and he elaborates the charge against Endecott: "Much matter was made of this, as fearing it would be taken as an act of rebellion, or of like high nature, in defacing the king's colors." J. Winthrop, *The History of New England from 1630 to 1649* 175 (J. Savage ed. 1953)(emphasis added).³⁸

³⁷ Selden's 1652 treatise, previously described, had translated King John's law of 1201 as prescribing that those failing to give the salute described in *United States v. Maine* as required by sovereignty of the seas "are to bee reputed enemies if they may bee taken, yea and their Ships and Goods bee confiscated as the Goods of Enemies. . . . [T]he Persons, which shall be found in this kinde of Ships, are to bee punished with imprisonment, at discretion, for their Rebellion." J. Selden, *supra*, n.28 at 401-02 (translating King John's law). Selden explains: "Penalties also were appointed by the King of England, in the same manner as if mention were made concerning a crime committed in som Territorie of his Island." *Id.* at 402.

³⁸ In fact, the colonists so much feared English reaction, that their leaders specially informed the home country. "The assistants met at the governour's, to advise about the defacing of the cross in the ensign at Salem, where (taking advice with some of the ministers) we agreed to write to Mr. Downing in England, of the truth of the matter, under
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Winthrop gives this contemporary account of the trial:

Mr. Endecott was called into question about the defacing. . . . [A committee of colonists] taking the charge to consider the offense, and the censure due to it, and to certify the court, after one or two hours time, made report to the court, that they found his offense to be great. . . . giving occasion to the State of England to think ill of us; — for which they adjudged him worthy [of] admonition, and to be disabled for one year from bearing any public office. . . .

Id. at 188-89.³⁹

Endecott's Case establishes a key historic point: from the earliest days of the legal system in America, the law deemed an individual to be engaging in a punishable act for defacing a flag, even domestically, even in peacetime. Defacing the flag invaded a sovereign governmental interest, even when undertaken for reasons of protest. At the time, the colonists saw the need to punish the act in clear sovereignty terms: that defacing the flag "would be taken as an act of rebellion, or of like high nature," even when unaccompanied by danger of violence or general revolt. This continued to be the law, as established by other flag cases punishing other failings in flag integrity, down through prosecutions and fines⁴⁰ at the time of the

all our hands, that, if occasion were, he might show it in our excuse; for therein we expressed our dislike of the thing [*i.e.*, the defacing], and our purpose to punish the offenders. . . ." *Id.* at 179.

³⁹ What matters is not, of course, the interesting but hypothetical question whether the colonists' case against Endecott would meet the test of *Texas v. Johnson*. The flag of England consisted at the time of a square of white with a large red cross of St. George, to which Endecott objected out of religious belief. Endecott's fellow colonists seem to have had tolerance, but even sympathetic fellow colonists knew, for the law, flag defacing was prohibited, not with regard to the expressive intent, but because the act itself, whether expressive, was an "act of rebellion."

⁴⁰ Seamen "were not infrequently brought before the courts and fined for refusing to strike [the flag]. If a merchant vessel refused to strike until she was shot at, she was compelled to pay to the king's
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Revolution, *The King v. Barnes*, 167 Eng. Rep. 473 (Court of Admiralty 1767) (concerning a Charleston incident),⁴¹ and to the early decisions of this Court. See, e.g., *The Marianna Flora*, 24 U.S. (11 Wheat.) 1, 52 (1825) (United States captain justified in firing upon ship committing an "indignity to the national flag").

As noted above, this Court has declared repeatedly that Madison's vital role in drafting the First Amendment makes him an authoritative source for original intent; this is particularly so on sovereignty matters. Madison consistently emphasized, as Jefferson's Secretary of State, the legal significance of infractions of the physical integrity of the flag. His earliest pronouncement concerned the incident "in October, 1800, when the Dey of Algiers forced a United States man-of-war, most inappropriately named the *George Washington*, to haul down the flag of the proud young republic, replace it with that of Algiers, and sail to Constantinople." T.A. Bailey, *A Diplomatic History of the American People* 101 (1969). Secretary of State Madison pronounced such a situation, as a matter of international law, a dire invasion of sovereignty which "on a fit occasion" might be "revived."⁴² Shortly thereafter, "the Pasha of Tripoli declared war on the United States by the established custom of chopping down the

ship twice the value of the gunpowder and shot expended." Fulton, *supra*, n.28 at 207. See II *Documents Relating to Law and Custom of the Sea* (R.G. Marsden ed. 1916), at 88 (describing fines).

⁴¹ In 1766, the Court of Admiralty tried a ship captain, one John Barnes, "for hoisting illegal colours. . . . near the Port of Charles Town in South Carolina. . . ." Barnes had on his ship "in open violation of the said Instructions and in contempt. . . of the right of sovereignty of the King. . . hoist[ed] a pendant at his masthead, and other colors which ought only to be worn by men-of-war." *Id.* at 474 (emphasis added).

⁴² II *American State Papers* 348 (Lowrie and Clarke ed. 1832). "One subject of equal importance and delicacy still remains. The sending to Constantinople the national ship of war the 'George Washington,' by force, under the Algerian flag, and for such a purpose, has deeply affected the sensibility, not only of the President, but of the people of the United States." *Id.* (emphasis supplied).

flagpole of the consulate (May 14, 1801)." S.F. Bemis, *A Diplomatic History of the United States* 176 (5th ed. 1955). Madison's agents discussed with him how violation of the physical integrity of the flag had meant war.⁴³

Thus, knowing the flag's history, knowing intimately the thinking behind the initial adoption and protection of the flag, and having these fresh reminders, in 1802 Madison readily pronounced a flag defacement in the streets of an American city to be a violation of law. Specifically, Madison pronounced a flag defacement in Philadelphia as actionable in court, as Judge Bork recently described this historic pronouncement:

[t]he tearing down in Philadelphia in 1802 of the flag of the Spanish minister, "with the most aggravating insults," was considered actionable in the Pennsylvania courts as a violation of the law of nations. 4 J. Moore, *Digest of International Law* 627 (1906) (quoting letter from Secretary of State Madison to Governor McKean (May 11, 1802)).

Finzer v. Barry, 798 F.2d 1450, 1456 (D.C. Cir. 1986), *aff'd in part and rev'd in part on other grounds*, *Boos v. Barry*, 485 U.S. 312 (1988). In other words, when the Philadelphians tore down the Spanish flag, and Madison was informed, he wrote the state Governor that he considered tearing down the flag "a violation of the law of nations."

Plainly, the same Framers who adopted the First Amendment were those who expressed the original understanding of flag protection, and they considered the two to be entirely consistent. This area of the law, and hence the judgment that flag defacing was an actionable violation of the law, fell within both Madison's area of jurisprudential expertise recognized among the Framers,

⁴³ The United States consul on the scene wrote Madison that the Pasha told him "that he declared war against the United States, and would take down our flag-staff on Thursday. . . our flag-staff was chopped down six feet from the ground, and left reclining on the terrace." II *American State Papers* 355 (1832).

and his weighty responsibility as Secretary of State.⁴⁴ Madison did not conclude, as defendants urged in these cases, that the First Amendment protected Americans' rights to tear down a flag or that flag defacing was a form of expression protected by his First Amendment. Madison had long and intimate familiarity with the significance of physical integrity of flags, as well as knowledge of the First Amendment that he drafted and moved through the First Congress, and he knew there had been no intent to withdraw the traditional physical protection from the flag.

One last incident illustrates precisely Madison's awareness of the important interest tied to the flag. While Madison was Secretary of State, in the years leading up to the War of 1812, England infuriated America by "impressment," the English navy's practice of disregarding American flag sovereignty in "impressing" into service (i.e., drafting) men, ostensibly deserters, found aboard American ships. In a historic episode of an impressment-related attack, Secretary of State Madison himself directly told the British Ambassador "that the attack on the *Chesapeake* was a detached, flagrant insult to the flag and sovereignty of the United States."⁴⁵ A Madison letter to James Monroe scored "the indignity offered to the sovereignty and flag of the nation. . . [which] demands. . . [as] an honorable reparation. . . . an entire

⁴⁴ Madison established early his expertise among the Framers in sovereignty matters. See *The Federalist*, No. 42 279-287 (J. Cooke ed. 1961); *id.*, No. 53, at 364; 3 M. Farrand, *Records of the Constitutional Convention* 332 (1911).

⁴⁵ I. Brant, *James Madison: Secretary of State 1800-1809* 413 (1953) (quoting British dispatch) (emphasis added). The British *Leopard*, directed to search for deserters, had intercepted and fired upon the American frigate *Chesapeake*. "[I]n ten or twenty minutes the flags of the frigate were lowered." D. Malone, *Jefferson the President: Second Term, 1805-1809* 421 (1974).

abolition of impressments from vessels under the flag of the United States. . . ." ⁴⁶

Like Madison, Jefferson protected the sovereignty interest in the flag, recognized its complete consistency with the Bill of Rights, and deemed abuse of that interest a serious matter of state, not some form of suppression of protected expression. Jefferson expressed his understanding most clearly in the context of the American sovereignty interest in trade rights. During the period of foreign war and blockade in the 1790s, the American flag was a neutral flag, and the law of trade⁴⁷ made foreign ships desire to fly it. As Washington's Secretary of State, Jefferson instructed American consuls to punish "usurpation of our flag." "You will be pleased, also. . . to give no countenance to the usurpation of our flag by foreign vessels, but rather, indeed, to aid in detecting it. . . ." ⁹ *The Writings of Thomas Jefferson* 49 (mem. ed. 1903). *Accord*, *id.* at 54, 56-57 (other Jefferson letters). Jefferson, as President, similarly urged "systematic and severe" punishment for flag abuse in 1807: "It is impossible to detest more than I do the fraudulent and injurious practice of covering foreign vessels and cargoes under the American flag; and I sincerely wish a systematic and severe course of punishment could be established." ¹¹ *id.* at 410. More generally, he wrote on July 10, 1806, emphasizing the "inviolability of our flag in its commerce with her enemies. We shall thus become, . . . honestly neutral, and truly

⁴⁶ Letter from James Madison to James Monroe (July 6, 1807) (Exhibit 18 to Brief for the Speaker and Leadership Group of the U.S. House of Representatives, *Amici Curiae, United States v. Haggerty*, (No. CR 89-315, filed Jan. 29, 1990) (available in the National Archives)). Its background, and a partial quotation, are in B. Perkins, *Prologue to War: England and the United States, 1805-1812* 145-46 (1961).

⁴⁷ A blockading nation cannot seize ships flying a neutral flag unless they carry contraband. See, e.g. *The Pedro*, 175 U.S. 354, 366-67 (1899); *Rose v. Himely*, 8 U.S. (4 Cranch) 240, 277 (1808) ("safety" of neutral flag).

useful to both belligerents [France and Spain]." 11 *id.* at 120. See 8 Annals of Cong. 14 (1803) (Jefferson message).

D. *The Original Intent has Continuing Significance.*

From the time of Madison and Jefferson to the current Act of Congress, protection of the flag has continued to serve the Framers' non-suppressive original intent.⁴⁸ For example, in 1915, Members of Congress challenged British abuse of American flags to evade the enemy at sea — much as Jefferson had protested such abuse in 1793 and 1806–07 — by noting that "[w]e use a flag. What does it mean? It means American sovereignty, and will be defended in connection with all that American sovereignty means"; President Wilson, cited in the 1989 Act's legislative history, agreed in protesting to the British in 1915 and 1916.⁴⁹ Congress relied on many such incidents in enacting 18 U.S.C. §700.⁵⁰

⁴⁸ This Court described United States taking of sovereignty over territories as the time of "change of flags." *Glasgow v. Baker*, 128 U.S. 560, 562 (1888); *United States v. Moore*, 53 U.S. 209, 222 (1851); *United States v. Acosta*, 42 U.S. 24, 27 (1843); *United States v. Heirs of Clarke*, 41 U.S. 228, 231 (1842). Similarly, the Court described how planting "a declaration. . . wrapped with the Hawaiian flag. . . [gave] sovereignty over Palmyra. . . ." *United States v. Fullard-Leo*, 331 U.S. 256, 261, 269 (1947). See S.M. Guenter, *The American Flag, 1777–1924* 49 (1990) (1820s and 1830s incidents); H. Wheaton, *Elements of International Law* 163–64 (1855) (Secretary of State Daniel Webster in 1842 states ship's crews "find their protection in the flag" as part of "[t]he sovereignty of the state").

⁴⁹ 52 Cong. Rec. 3595 (1915); 16 *Messages and Papers of the Presidents* 8056 (1924) (reprinting Wilson's Secretary of State's 1915 protest to Britain over the "legality and propriety of deceptive use of the flag"). In 1916, when the British seized American flag vessels, Wilson's Secretary of State protested that "nationality finds visible expression in the right to fly a flag. . . [which] makes them amenable to the sovereignty and to the laws" of America alone. *Papers Relating to the Foreign Relations of the United States, 1916 Supplement*: H. Doc. No. 810, 69th Cong., 2d Sess. 358 (1929).

⁵⁰ "It is difficult to demand apologies from other countries in which our flag is burned and torn to shreds, when we do nothing here at

Continued

Most recently, in 1987 the United States reflagged Kuwaiti tankers to project American sovereignty in the Persian Gulf. Secretary Weinberger testified, in an explanation close to those of Madison or Wilson, "we obviously feel a particular obligation to ships carrying the American flag. . . we believe they are entitled to the kind of protection that we give all of our citizens. . . ." ⁵¹ In then-Senator Quayle's summation, "[o]bviously an attack on that tanker with our flag would be an attack upon us." ⁵² The State and Defense departments themselves cited in 1987 the previously-described precedent of President Wilson, and explained that "our Navy will be there. . . to offer the protection to the flag." ⁵³ Thus, the Framers' original understanding of flag protection in sov-

home when the same thing happens." *Desecration of the Flag: Hearings Before Subcomm. No. 4 of the House Comm. on the Judiciary*, 90th Cong., 1st Sess. 37 (1966) (Rep. Quillen). See, e.g., 2 J.B. Moore, *Digest of International Law* 136 (1906) (1863 protest of Nicaraguan "forcible and violent removal of the [American] flag"); 5 M.M. Whiteman, *Digest of International Law* 178 (1972) (1958 Peruvian destruction of American flag, in connection with visit of Vice President Nixon); *id.* at 179 (1959 Panamanian destruction of American flag); *id.* at 180 (1960 Venezuelan burning of American flag).

⁵¹ *The Policy Implications of U.S. Involvement in the Persian Gulf: Joint Hearings By Investigations Subcomm. & Defense Policy Panel of the House Comm. on Armed Services*, 100th Cong., 1st Sess. 36, 48 (1987). Asked "[u]nder international law, what is the legal effect when we reflag the ships?" Secretary Weinberger testified that "They are American ships, as I said." *Id.* at 37.

⁵² *U.S. Military Forces to Protect "Re-Flagged" Kuwaiti Oil Tankers: Hearings Before the Senate Comm. on Armed Services*, 100th Cong., 1st Sess. 59 (1987); accord, *id.* at 10 ("it is not only showing the flag that is important, but maintaining the flag") (Sen. Glenn); *id.* at 107 ("You know, the flagging is a statement of power") (Sen. Shelby).

⁵³ *U.S. Policy in the Persian Gulf: Hearing Before Subcomms. of the House Comm. on Foreign Affairs*, 100th Cong., 1st Sess. 18 (1987) (language regarding protection); *Kuwaiti Tankers: Hearings Before the House Comm. on Merchant Marine and Fisheries*, 100th Cong., 1st Sess. 73 (1987) (analogy to Wilson's position in 1915–16).

ereignty terms, unrelated to any suppressive notions, remains alive in the Persian Gulf today.⁵⁴

In the most famous domestic destruction after the Framers' era, Lincoln kept Fort Sumter's flag, reportedly the crucial link to sovereignty,⁵⁵ flying in April, 1861 "to maintain visible possession"; Lincoln described the challenge to it as seeking "to drive out the visible authority of the Federal Union, and thus force it to immediate dissolution." *Message of the President of the United States*, Cong. Globe App., July 4, 1861, at 1.⁵⁶ Similarly, this Court described how Union occupiers of New Orleans in 1862 "required the authorities to display the flag of the Union from the public buildings. . . . [and then] directed the flag to be raised upon the Mint," *The Venice*, 69 U.S. (2 Wall.) 258, 275 (1864), as an incident of the "sovereignty of the United States."⁵⁷ "[T]he flag. . . . was raised

⁵⁴ Defendants admitted "the function the flag serves on a ship in the Persian Gulf." Defendants' Reply Memo. in Support of Motion to Dismiss, *United States v. Haggerty*, No. CR 89-315 at 17-18 (filed Feb. 7, 1989).

⁵⁵ Lincoln received a requested report from Charleston that "four miles down the Harbor the Standard of the U. States floated over Fort Sumpter the only evidence of jurisdiction and nationality." Letter to Abraham Lincoln, Mar. 27, 1861, R.T. Lincoln Coll., at 8389 (available in Manuscript Division, Library of Congress); see R.N. Current, *Lincoln and the First Shot* 73 (1963).

⁵⁶ Lincoln wrote that dispatch-bearers to Charleston should parley with the governor "if on your arrival there the flag of the United States shall be flying over Fort Sumter," and a relief expedition "finding your flag flying, will attempt to provision you." IV *The Collected Works of Abraham Lincoln* 323 (Basler ed. 1953); I *The War of the Rebellion: A Compilation of the Official Records of the Union and Confederate Armies* 235, 245 (1880); R.N. Current, *supra*, n.55 at 101-02, 108-09. The fort's defenders would not fire "unless compelled to do so by some hostile act against this fort or the flag of my Government." *War of the Rebellion*, *supra*, at 23. Ultimately, the flag was shot down, and the Confederate flag raised. *Id.* at 23 and 29. "[T]he attack on Fort Sumter" began hostilities. *The Prize Cases*, 67 U.S. (2 Black) 635, 669 (1862).

⁵⁷ Captain Farragut's order is described in *The Venice*; its text is quoted in J. Parton, *General Butler in New Orleans* 70 (1864).

accordingly, but was torn down on the same or the next day," *The Venice*, 69 U.S. at 277; the responsible individual was tried and convicted.⁵⁸

Soon thereafter, the State Department pronounced the United States, to maintain its sovereignty, "fully empowered and authorized to prevent the abuse and disgrace of its national emblem both at home and abroad." 2 J.B. Moore, *supra* n.50, at 135. Repeatedly, the State Department addressed domestic flag destructions, even in protests, as sovereignty incursions unshielded by the First Amendment, such as regarding domestic acts against the German flag in 1935 and 1941.⁵⁹

The Framers' articulation of this original intent long preceded the later, derivative, symbolic interest:

the reverence which all Americans today pay to their flag was foreign to the minds of the men of 1777. A flag was essential to the conduct of warfare between ships at sea, and the Congress met the need. . . . It is obvious that their action was animated by considerations of practical need, and but slightly, if at all, by sentiment. . . .

M.M. Quaife, *The Flag of the United States* 66-67 (1942). By 1907, this Court in *Halter v. Nebraska* could refer both to the sovereignty interest, and to the flag as an emblem, and it could sanction both the past pattern that "insults to a flag. . . and indignities put upon it. . . have often been resented and sometimes punished on the spot," *Halter v. Nebraska*, 205 U.S. 34, 41 (1907), and the developing pattern (which it approved) of statutory protection.

What the original intent demonstrates is something which transcends the specific formulations of one era or

⁵⁸ G.H. Preble, *supra*, n.30 at 473 (reprinting sentencing order for William B. Mumford for the "overt act thereof in tearing down the United States flag from a public building of the United States. . . .").

⁵⁹ 2 G.H. Hackworth, *Digest of International Law* 128 (1941) (1935); 5 M.M. Whiteman, *supra*, n.50 at 174-75 (1941 Navy court-martial for tearing down German flag). *Accord*, 2 J.B. Moore, *supra*, n.50 at 140-41 (1897 California burning of Portuguese flag); *id.* at 140-41 (1899 hauling down of German flag).

another, namely, the historic core of consistency between flag protection and the First Amendment which left room for those various formulations. Madison and Jefferson established the original understanding that the government could treat the flag in terms of its legal significance — not as the public may when it expresses values such as patriotism, or as the defendants may when they express their own values, but as a sovereign nation acts, apart from whatever the public or defendants have as their values, in protection of its sovereignty. The Framers intended the government to be able to protect the flag under the original Bill of Rights. A notion that such protection requires a change in the Bill of Rights would have been to them, as it remains today, anathema.

CONCLUSION

The Flag Protection Act of 1989 amends the prior federal law to be content-neutral. It follows the Framers' original intent that flag protection accords perfectly with the Bill of Rights. Consistent with Congress's intent to comply with *Texas v. Johnson*, this Court should uphold the Act.

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UNITED STATES OF AMERICA: ATTRACT

FORWARD FROM THE UNITED STATES DISTRICT COURT
OF THE DISTRICT OF COLUMBIA AND THE WESTERN
DISTRICT OF VIRGINIA

REPORT OF THE UNITED STATES DEPARTMENT OF AGRICULTURE
BUREAU OF PLANT INDUSTRY

SECRET

THE

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WINTER 1992

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In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1433 AND No. 89-1434

UNITED STATES OF AMERICA, APPELLANT

v.

SHAWN E. EICHMAN, ET AL.

UNITED STATES OF AMERICA, APPELLANT

v.

MARK JOHN HAGGERTY, ET AL.

*ON APPEALS FROM THE UNITED STATES DISTRICT COURTS FOR THE
DISTRICT OF COLUMBIA AND THE WESTERN DISTRICT OF
WASHINGTON*

**BRIEF OF THE UNITED STATES SENATE AS AMICUS CURIAE IN
SUPPORT OF APPELLANT**

INTEREST OF THE UNITED STATES SENATE

These cases present to the Court a question about the constitutionality of 18 U.S.C. § 700, as amended by the Flag Protection Act of 1989, Pub. L. No. 101-131, § 2(a), 103 Stat. 777, and as applied to persons who knowingly burned flags of the United States. The Senate's interest in these cases is grounded in its commitment to protect the physical integrity of the flag, and in its conviction that the Act is a faithful and constitutional response to this Court's decision in *Texas v. Johnson*, 109 S.Ct. 2533

(1989). Accordingly, the Senate has authorized the filing of this brief pursuant to 2 U.S.C. § 288e(a), which provides that the Senate may direct its Legal Counsel to appear as *amicus curiae* in its name "in any court of the United States . . . in which the powers and responsibilities of Congress under the Constitution of the United States are placed in issue."¹

SUMMARY OF ARGUMENT

The Congress was asked as early as 1878 to adopt legislation to protect the flag. The history of flag legislation since that time helps to illuminate the understanding that citizens and legislators have had about the interests that such protective legislation is intended to serve. It also demonstrates the persistent determination of the Congress, the states, and those who have petitioned them for legislation, neither to favor nor to disserve any group or point of view in the course of protecting the flag, and their concern, which has been sharpened over time, to assure that protection of the flag from mutilation does not trench upon the opportunity of all citizens to exercise their right to speak against their government or their flag.

1. The first legislative proposals, starting in 1878 and continuing into 1896, were directed at the use of the flag on commercial products and in advertising. One hundred years ago, the House Committee on the Judiciary, in describing why it should be an offense "to deface, disfigure, or prostitute [the flag] to the purposes of advertising," described the significance of the flag in terms applicable then and now: "The flag of our country is the symbol of our national existence, power, and sovereignty. It is the emblem of freedom and equality and representative of

¹ See S. Res. 213, 101st Cong., 1st Sess. (1989), 135 Cong. Rec. S16191-92 (daily ed. Nov. 19, 1989) (directing appearance in *United States v. Eichman*); S. Res. 234, 101st Cong., 2d Sess. (1990), 136 Cong. Rec. S441 (daily ed. Jan. 25, 1990) (directing appearance in *United States v. Hagerty*). Permission for the Senate to appear is "of right" and may be denied only for untimeliness. 2 U.S.C. § 288f(a).

the glory of the American name. It is a reminder of American fortitude, courage, and heroism; and of the suffering and sacrifices on land and sea which have been endured for its preservation and for the preservation of the country it represents." H.R. Rep. No. 2128, 51st Cong., 1st Sess. 1 (1890). However, the objection was heard in Congress that the Democratic and Republican parties would not accept any restriction on the use of flags for political advertisements by the painting or printing of the names of candidates and campaign slogans on flags, as was prevalent at the time, and the proposals did not become law.

2. In 1896, concern about the misuse of the flag in advertising was joined by alarm over the physical harm to the flag that occurred during the McKinley-Bryan presidential campaign when partisans of both candidates ripped down and trampled upon each other's flags. A large number of petitions were submitted to Congress requesting a flag desecration law, but it was the states, beginning with Pennsylvania, that acted first to prohibit both the use of flags in advertising and their mutilation. A petition to Congress from Illinois made clear that the purpose of a proposed flag law was "NOT to make our citizens loyal," but "TO REGULATE the actions of those who without a disloyal thought" desecrate the flag.

3. Although a number of states in the immediate aftermath of the 1896 campaign passed laws which, apart from prohibitions on use of the flag in advertising, were limited to physical attacks on the flag, the American Flag Association, formed in 1897 to promote flag legislation, circulated in 1900 a model law that also would make it an offense to "defy" or "cast contempt, either by words or acts," upon the flag. When the Congress enacted in 1917 a flag desecration law for the District of Columbia, it adopted the broad formulation proposed by the Flag Association, as did the Commissioners on Uniform State Laws in promulgating a uniform flag law that year.

4. As the United States' entry into World War II approached, the Congress considered the adoption of nation-

wide flag desecration legislation. In response to a request for his views, Attorney General Robert H. Jackson stated that "[l]egislation on the subject appears to be desirable. . . . I find no objection to the enactment of the bill." S. Rep. No. 130, 77th Cong., 1st Sess. 2 (1941) (reprinting letter). While the Congress did not adopt a nationwide flag desecration law, it did adopt in 1942 a recommendatory code on flag observances. In *West Virginia State Board of Education v. Barnette*, this Court took note of "[t]he action of Congress in making flag observance voluntary." 319 U.S. 624, 638 (1943).

5. Partly out of concern about the impact of flag burnings on the morale of American troops in Vietnam, the Congress enacted a nationwide flag desecration statute in 1968. Starting with the legislation that it had enacted for the District of Columbia in 1917, but accepting Attorney General Ramsey Clark's advice that "[p]articulate care should be exercised to avoid infringement of free speech," S. Rep. No. 1287, 90th Cong., 1st Sess. 5 (1968), the Congress excised prohibitions on defying the flag or casting contempt on it by word or act. Between 1969 and 1974, this Court overturned convictions under three state flag laws that made it an offense to cast contempt on the flag by words, contained a vague proscription on the contemptuous treatment of the flag, or permitted conviction for affixing a peace symbol to a flag in a manner that did not harm the flag. None of the problems identified by the Court in those cases existed in the federal statute which had been enacted in 1968. Shortly thereafter, the Court let stand convictions that were based only on the physical destruction of flags.

6. In 1973, Texas replaced a flag law that was similar to other state flag laws, and adopted a statute that had been suggested in a draft of the American Law Institute's Model Penal Code. In *Texas v. Johnson*, this Court concluded that "[t]he Texas law is . . . not aimed at protecting the physical integrity of the flag in all circumstances, but is designed instead to protect it only against impair-

ments that would cause serious offense to others." 109 S.Ct. at 2543. The Flag Protection Act was accordingly designed to assure that federal law complied with that ruling by making the regulation "'content neutral.' It is the act of harming the physical integrity of the flag, rather than any message the actor might be attempting to convey, that is to be punished. . . ." 135 Cong. Rec. H6991 (daily ed. Oct. 12, 1989) (Rep. Brooks).

7. Thus, for nearly a century the destruction of the United States flag has been viewed as conduct that causes serious harm to the nation. The Flag Protection Act of 1989 should be assessed in the context of its predecessor enactments and the objectives of the successful movement for flag protection legislation in the states at the turn of the century. That movement, which was spurred in 1896 by political violence in which Democrats and Republicans trampled each other's flags or shot at them, was not directed at suppressing political dissent. The strength of the government's interest in preserving the flag as a national symbol is demonstrated by the sustained effort by the states and the Congress to protect the flag from mutilation and destruction. As Attorney General Clark advised during consideration of the 1968 flag law, whether a federal criminal remedy is the proper redress for the injury that is inflicted on the nation when the flag is burned is properly a question for the Congress. In enacting a statute that is limited to the protection of the physical integrity of the flag in all circumstances, Congress has crafted a remedy that is respectful of first amendment values.

ARGUMENT

The Century-Long History of Flag Protection Legislation in This Country Aids in Demonstrating that the Flag Protection Act of 1989 Serves an Important Public Purpose in a Neutral Manner That is Respectful of the First Amendment

This brief is submitted for the Court's consideration in conjunction with the briefs of appellant and other amici who are providing to the Court full doctrinal arguments in support of the constitutionality of the Flag Protection Act of 1989. Its principal and narrower objective is to show that the Act's purpose—to protect the physical integrity of the flag without regard to any message that individuals may seek to convey through their use of it—is demonstrated not only by the statute's text but by the history of flag legislation since the Congress was first asked in the late 1800s to enact protective measures. The initial flag protection legislation proposed in the Congress primarily addressed concerns over the increased use of the flag in advertising, but no legislation was enacted until incidents involving destruction of the flag during the 1896 presidential campaign galvanized public reaction. In the decades that followed, state after state and then the federal government acted to prevent both the use of the flag in advertising and physical assaults on it. The Flag Protection Act of 1989 is the direct outgrowth, carefully pruned to eliminate excesses which this Court and others have identified, of this sustained nationwide determination to preserve the flag's value as the nation's salient symbol. The century-old history of flag legislation, which will be recounted below, amply shows that the Act is directed at that end and not at suppressing particular ideas.

1. BETWEEN 1878 AND 1896 THE CONGRESS CONSIDERED BUT DID NOT ENACT LEGISLATION DIRECTED SOLELY AT THE USE OF THE FLAG IN ADVERTISING

Flag protection legislation was proposed in the Congress as early as 1878. Concerned with the effects of an

increasingly commercialized society on the nation's flag, the public appealed to the Congress to prohibit the widespread use of the flag in advertising. An 1895 petition, one of many the Congress received on the flag, explained that commercial use of the flag was not viewed as "in the nature of an intended disrespect" but rather as "abuse[] with which everyone is familiar, but the evil of which few have appreciated."² "[I]f the flag is to be held in any degree of veneration," the petition advised the Congress, "it must not be made familiar to the sight as a medium of advertising."³

It appears that the first bill "[t]o prevent the desecration of the United States flag" was offered in 1878 by Representative Samuel S. Cox of New York. The bill provided for a fine of up to fifty dollars or imprisonment of not less than thirty days for anyone "who shall disfigure the national flag, either by printing on said flag, or attaching to the same, or otherwise, any advertisement for public display. . . ."⁴ Reporting a nearly identical bill that passed the House in 1890, the Committee on the Judiciary justified the proposed law on grounds which have endured as a basis for flag legislation:

The flag of our country is the symbol of our national existence, power, and sovereignty. It is the emblem of freedom and equality and representative of the glory of the American name. It is a reminder of American fortitude, courage, and heroism, and of the suffering and sacrifices on land and sea which have been endured for its preservation

² National Flag Committee of the Society of Colonial Wars in the State of Illinois, *The Misuse of the National Flag of the United States of America* 15 (1895) (on file at the National Archives). The receipt of this petition was noted, together with several other "petitions of citizens of the United States, praying the passage of a law to prevent the desecration of the American flag," in the Journal of the Senate, 54th Cong., 1st Sess. 18 (1895).

³ Petition of Society of Colonial Wars, *supra* n.2, at 21 (quoting editorial).

⁴ H.R. 4305, 45th Cong., 2d Sess. (1878). A similar bill was introduced in the next Congress. H.R. 3153, 46th Cong., 2d Sess. (1880).

and for the preservation of the country it represents. . . . It should be held a thing sacred, and to deface, disfigure, or prostitute it to the purposes of advertising should be held to be a crime against the nation.

H.R. Rep. No. 2128, 51st Cong., 1st Sess. 1 (1890).⁵

Throughout the next several Congresses, more bills to bar the use of the flag in commercial advertisements were introduced, but none was enacted.⁶ A number of these proposals would have proscribed any advertisement on flags "for public display," as well as for "private gain." *E.g.*, S. 1012, 54th Cong., 1st Sess. (1895) (as introduced). These proposals elicited a concern by some members of the Congress that the legislation might be read to "prevent the use of the flag as an advertisement by any political party." 23 Cong. Rec. 5188 (1892) (Rep. Caruth). Addressing the practice, popular since the presidential campaign of 1840, of printing or painting political slogans and the images of political candidates on flags,⁷ members derided any thought of "prevent[ing] our Republican friends from advertising 'Blaine and Reciprocity' on the flag, or our Democratic friends from blazoning upon it 'Cleveland and Free Silver.'" ⁸ In accord with those views in 1896 the Committee on the Judiciary reported an amendment to a flag advertising bill that limited its proscription to "goods, wares, or merchandise." S. 1012, 54th Cong., 1st Sess. (1896) (as reported). The Chairman of the Committee, Senator George F. Hoar, commented that,

⁵ See 21 Cong. Rec. 10697 (1890) (House passage).

⁶ See, *e.g.*, H.R. Rep. No. 541, 52d Cong., 1st Sess. (1892) (reporting H.R. 335); H.R. Rep. No. 677, 53d Cong., 2d Sess. 1 (1894) (reporting H.R. 5315).

⁷ See H. Collins, *Threads of History* 102-05 (1979).

⁸ 23 Cong. Rec. 5188 (1892) (Rep. Kilgore). Members of the House may have been mindful that in the same Congress Senator John Sherman had introduced a measure to prohibit printing or painting on flags "the motto of any political party, or the name of the candidate of any political party for any office." S. 853, § 2, 52d Cong., 1st Sess. (1891).

"I am afraid that the great political parties of the country would not consent that the practice of hanging out the Flag with the names of the candidates attached should be abandoned." ⁹

2. PHYSICAL ASSAULTS ON FLAGS DURING THE 1896 PRESIDENTIAL CAMPAIGN LED TO A MOVEMENT TO OBTAIN STATUTORY PROTECTION FOR THE FLAG

In 1896, the concern about the use of the flag in advertising was joined by alarm over physical harm to the flag. The presidential campaign that year between William McKinley and William Jennings Bryan, coinciding with economic depression and labor and agrarian unrest, came at a particularly volatile period in American history.¹⁰ When the flag was used to advertise candidates in the presidential campaign, members of both parties reacted, often violently, by tearing down those flags and trampling or otherwise mutilating them.

In protest of this treatment of the flag, a large number of petitions were submitted to Congress praying for the passage of a bill to prevent flag desecration.¹¹ The petition of the Daughters of the American Revolution described examples of assaults on the physical integrity of the flag and resulting violence during the 1896 campaign, "notices of which were wide-spread in the newspapers at the time of the occurrences." ¹² In one instance, "A large American flag, bearing a banner with a partisan motto, the property of a citizen, was suspended across the principal street of Hammond, Ind., from a private residence. After having been repeatedly threatened, the flag was torn down in the early morning and trampled into the

⁹ H. Baldwin, A.F. Delafield, A. Hamilton, *Report on Desecration of American Flag* 4 (1896).

¹⁰ P. Glad, *McKinley, Bryan, and the People* 208 (1964).

¹¹ *E.g.*, Journal of the Senate, 55th Cong., 2d Sess. 45, 68, 80, 84, 88, 105, 108, 110, 123, 150, 152, 155, 173, 175, 192, 206, 218, 228, 284, 360 (1898).

¹² Petition of the Flag Committee of the National Society, Daughters of the American Revolution, Jan. 27, 1898, at 1 (on file at the National Archives).

mud." *Id.* at 2. In another, "A stranger in Council Bluffs, Iowa, rode up to a large American flag bearing a partisan banner and fired upon it with a shotgun. A soldier shot at the mounted assailant of the flag, killing the horse and wounding the man, who escaped." ¹³

Reflecting later on how the events of 1896 triggered the call for flag legislation, the President of the American Flag Association, an organization formed in 1897 to promote legislation on flag desecration, recalled the

presidential campaign of 1896, when political rancor ran so high, and political excitement knew no bounds, . . . infuriated partisanship was manifested in tearing down the Flag, tearing it in pieces, and trampling it in the dust; when . . . political parties, each assuming that they alone represented the patriotism of the country, advertised their political candidates by attaching their names and pictures to the Flag, or writing their names upon the white stripes of the Flag; when our country was flooded with merchandise advertised by pictures of the Flag, and in some instances indelibly burned into the material of which the merchandise was made.

American Flag Association, *Fifth Circular of Information* 20-21 (1907-08) (reprinting Colonel Ralph E. Prime's 1907 address to the Association).

The concern with physical harm to the flag that grew out of the 1896 campaign was manifested in legislation proposed in the Congress in 1897. In addition to prohibiting the use of the flag in commercial and political adver-

¹³ *Id.* The violence was not limited to flags bearing campaign messages. See, e.g., N.Y. Times, Nov. 1, 1896, at 8, col. 2 (reporting that a young girl, who was part of a McKinley delegation and was carrying a small flag while singing sound-money songs, had her flag snatched by a man carrying a Bryan banner, who then cast the flag on a fire that was burning sound-money literature); Omaha World-Herald, Nov. 1, 1896, at 3, col. 3 (reporting that during a free silver parade "the large lifesized picture of W. J. Bryan, which was carried at the head of the parade, was fired into and riddled with shot, as was also the American flag, which was carried alongside of it").

tising, H.R. 5430 would have made it a misdemeanor to "tear down, trample upon, or treat with indignity, or wantonly destroy the national flag or coat of arms of the United States." ¹⁴ But it was the states that first enacted legislation on flag desecration. First, Pennsylvania made it a felony to use the flag for advertising or "wilfully and maliciously [to] take down, pollute, injure, remove or in any manner damage or destroy any American flag or flagstaff which now or hereafter may be put, erected or placed on any private or public building or place." 1897 Pa. Laws 34. Then, after the Flag Association, on "[f]ailing in uniting the different interests at work with Congress . . . determined to turn its attention to State Legislation," ¹⁵ in a two-month period in 1899, six states—New York, New Hampshire, Maine, Massachusetts, Minnesota, and Connecticut—enacted measures to prohibit both the use of the flag in advertising and the mutilation and trampling of it. See *infra* p. 12.

From the outset, proponents of the flag legislation that emerged in response to the excesses of the 1896 campaign made clear that their purpose was "NOT to make our citizens loyal," but "TO REGULATE the actions of those who without a disloyal thought, unthinkingly, turn our national flag into street awnings, advertising signs of all descriptions, pull down or shoot at it when bearing the names of opposing political parties. . . ." ¹⁶ They also made clear that they sought to restrain misuse of the flag by anyone, including members of the major political parties. In the words of a Connecticut state senator that were widely disseminated by the Flag Association, the purpose of flag protection legislation was "to keep our

¹⁴ H.R. 5430, 55th Cong., 2d Sess. (1897). See also H.R. 5491, 55th Cong., 2d Sess. (1898); S. 3100, 55th Cong., 2d Sess. (1898); S. 3174, 55th Cong., 2d Sess. (1898); H.R. 10999, 55th Cong., 3d Sess. (1898).

¹⁵ American Flag Association, *Circular of Information* 8 (1900) [hereinafter "1900 Circular"].

¹⁶ Petition of the Illinois Society of the Sons of the American Revolution and Society of Colonial Wars, in the State of Illinois, Mar. 21, 1898, at 1 (emphasis in original) (on file at the National Archives).

flag sacred and free from any alteration or desecration whatever. We don't want any Presidential candidate or political party to use it or alter it in any way." *1900 Circular*, *supra* n.15, at 16.

3. THE AMERICAN FLAG ASSOCIATION'S CAMPAIGN TO PROVIDE BROADER PROTECTION FOR THE FLAG ACHIEVED CONSIDERABLE SUCCESS IN THE STATES AND FINALLY IN THE CONGRESS, IN 1917, WITH THE ENACTMENT OF A FLAG DESECRATION LAW FOR THE DISTRICT OF COLUMBIA

In 1900, the American Flag Association circulated a model law for use by its constituent committees in advocating the passage of flag laws in their respective states.¹⁷ In drafting the model law, the Flag Association made an influential determination about the scope of flag protection legislation. Of the ten states that had adopted flag laws by 1900, seven had prohibited the mutilation of the flag in addition to prohibiting the use of the flag in advertising. Three of those states—Connecticut, Maine, and New Hampshire—had limited their statutes to the physical protection of the flag.¹⁸ A fourth state, Pennsylvania, had prohibited specified conduct, the malicious taking down or removing of flags, in addition to damaging or destroying them. *See supra* p. 11. Three other states—New York, Minnesota, and Massachusetts—had introduced elements, namely, "defying" the flag or "treating [it] contemptuously," that may have included undefined conduct or speech about the flag.¹⁹ Taking this

¹⁷ *1900 Circular*, *supra* n.15, at 19-20.

¹⁸ 1899 N.H. Laws 302-03 (applicable to anyone "who publicly mutilates, tramples upon, or defiles any of said flags"); 1899 Me. Laws 147 (applicable to anyone "who in any manner mutilates, tramples upon or otherwise defaces or defiles any of said flags"); 1899 Conn. Pub. Acts 1014 (applicable to anyone "who publicly mutilates, tramples upon, or otherwise defaces or defiles any of said flags").

¹⁹ 1899 N.Y. Laws 17-18 (applicable to anyone "who publicly mutilates, tramples upon or otherwise defaces or defies any of said flags"); 1899 Minn. Laws 169 (same); 1899 Mass. Acts 225 (applicable to "[w]hoever publicly mutilates, tramples upon, defaces, or treats contemptuously any of said flags"). The "treats contemptuously" language of the 1899 Massachusetts law was the subject of *Smith v. Goguen*, 415 U.S. 566 (1974).

broader approach, the Flag Association recommended that states enact a flag law that would apply to anyone who shall "publicly mutilate, trample upon or publicly deface, or defy, or defile, or cast contempt, either by words or act, upon any such flag" of the United States. *1900 Circular*, *supra* n.15, at 20, § 1. The impact of the Flag Association proposal became quickly evident when four states—Oregon, Indiana, Wisconsin, and Michigan—adopted in 1901 flag desecration bills that included a prohibition on defiance of the flag, as well as the casting of contempt upon it by words or act.²⁰

While the Flag Association was achieving success in obtaining state laws, the effort to obtain federal flag legislation was renewed,²¹ in part because of a restrictive court ruling on a state flag statute. Testifying in 1902 that nineteen states had adopted legislation to prevent flag desecration, the Flag Association brought to the Congress's attention a decision of the Illinois Supreme Court, in *Ruhstrat v. People*, 185 Ill. 133, 57 N.E. 41 (1900), that erected an impediment to those state enactments. The Illinois court had held that a state statute prohibiting use of the flag for advertisements violated state and federal constitutional guarantees of personal liberty and deprived citizens of the United States of the federal privilege of using the flag as a trademark. In reaching that conclusion, the court observed that the Congress, which had exercised "its inherent power to establish a flag or emblem symbolic of national sovereignty," had "passed no legislation restricting the use of the flag." *Id.* at 146, 57 N.E. at 45. The use of the flag in advertising and as a trademark had received, in the court's estimation, "the sanction of

²⁰ 1901 Or. Laws 286-87 (adopting Flag Association proposal); 1901 Ind. Acts 351-53 (same); 1901 Wis. Laws 173-75 (same); 1901 Mich. Pub. Acts 139-40 (same).

²¹ In 1901 and 1902, numerous bills to prevent the desecration of the flag were introduced in the Congress and the first hearings on the subject were held. *See Hearing on Bills to Prevent the Desecration of the American Flag Before the Senate Comm. on Military Affairs*, S. Doc. No. 229, 57th Cong., 1st Sess. (1902).

those having in charge the execution of the trade-mark laws of the United States." *Id.*

In 1905 the Congress removed the obstacle to state protection of the flag that had been created by the Illinois decision. In its revision of the trademark laws that year, the Congress provided that registration of a mark could be refused if it "consists of or comprises the flag or coat of arms or other insignia of the United States, or any simulation thereof, or of any State or municipality, or of any foreign nation."²² This provision reflected the judgment that the flag was not a design that should "become the exclusive property of the party using the same as his trade-mark." H.R. Rep. No. 3147, 58th Cong., 3d Sess. 7 (1904). The provision thus codified the emerging policy of the United States Patent Office to deny trademarks for designs that incorporated the national flag, emblem, or colors because "[i]t is contrary to public policy to detract in any way from the honor which is due to the flag."²³

Two years later, this Court upheld in *Halter v. Nebraska*, 205 U.S. 34 (1907), the constitutionality of a Nebraska prohibition on the use of the flag in advertising. The 1905 trademark law had eliminated the argument on which the Illinois Supreme Court in *Ruhstrat* had based its invalidation of a similar Illinois law, and the Court simply noted its enactment. *Id.* at 39. The Court observed that more than half of the states had adopted statutes similar to Nebraska's, and "[t]hat fact is one of such significance as to require us to pause before reaching the conclusion that a majority of the States have, in their legislation, violated the Constitution of the United States."²⁴ The statute, the Court held, served a legitimate public purpose because the use of the flag in advertising "tends to

²² Act of February 20, 1905, ch. 592, § 5, 33 Stat. 724, 725 (codified at 15 U.S.C. § 1052(b) (1988)).

²³ *Ex parte Ball*, 98 O.G., 2366 (1902), reprinted in H.R. Doc. No. 460, 57th Cong., 2d Sess. 102, 103 (1902).

²⁴ *Id.* at 40; See also *id.* at 39 n.1 (collecting citations to statutes in thirty states).

degrade and cheapen the flag in the estimation of the people, as well as to defeat the object of maintaining it as an emblem of National power and National honor." *Id.* at 42.

With the constitutionality of state flag protection laws supported, the Commissioners on Uniform State Laws appointed a committee in 1912 to consider a uniform law to prohibit the desecration of the American flag. The committee's report to the commissioners the following year recounted how flag protection legislation "arose from the condition of things in 1896," referring both to the use of the flag in advertising and to the incidents in that year's campaign in which the flag "was torn down and torn in pieces and trampled in the dust."²⁵ The commissioners adopted a uniform flag law in 1917, which the American Bar Association approved in 1918 and recommended for passage by the states.²⁶ With only a slight rearrangement of terms, the mutilation provision of the 1917 uniform act was taken verbatim from the American Flag Association's 1900 proposal.²⁷

In the meantime, the American Flag Association had not abandoned its federal legislative effort entirely, and urged the Congress to enact a flag desecration law at least for the District of Columbia. 54 Cong. Rec. 1728 (1917) (Sen. Pomerene). In early 1917, the Congress did so, enacting flag legislation for the District that mirrored the model law the American Flag Association had circulated in 1900.²⁸ Described on the Senate floor as "very compre-

²⁵ Report of the Special Committee on the Matter of a Uniform Law for the Protection of the Flag of the United States, reprinted in the Proceedings of the Twenty-Third Annual Conference of Commissioners on Uniform State Laws 157-58 (1913). That history is also recounted in the Commissioners' Prefatory Note to the Uniform Flag Act, 9B U.L.A. 48 (1966).

²⁶ Report of the Forty-First Annual Meeting of the American Bar Association 82 (1918).

²⁷ Compare 9B Unif. Flag Act, § 3, 9B U.L.A. 52 (1966) with 1900 Circular, *supra* n.15, at 20.

²⁸ See Act of February 8, 1917, ch. 34, 39 Stat. 900 (codified as amended at 4 U.S.C. § 3 (1988)).

hensive," 54 Cong. Rec. 1728 (1917) (Sen. Pomerene), the measure, in addition to prohibiting the placing of words, pictures, or any advertisements on any flag of the United States, made it a misdemeanor to "publicly mutilate, deface, defile or defy, trample upon or cast contempt, either by word or act" any flag of the United States, which the act defined broadly to include "any picture or representation" which the average person would believe to "represent the flag."²⁹

4. THE CONGRESS'S ACTIONS DURING THE SECOND WORLD WAR REFLECT ITS DETERMINATION NOT TO COMPEL WORDS OR CEREMONIES OF LOYALTY TO THE FLAG

As American participation in the Second World War drew close, interest in national flag legislation was renewed. In response to a request from the Chairman of the Senate Committee on the Judiciary for his views on a bill to prevent the desecration and mutilation of the flag, Attorney General Robert H. Jackson responded that "[l]egislation on the subject appears to be desirable."³⁰ Suggesting that the "best approach . . . would be to extend the existing law relating to the District of Columbia to the rest of the United States," the Attorney General concluded that, "I find no objection to the enactment of the bill." *Id.* Adopting the Attorney General's suggestion, the Senate passed bills in 1941 and 1943 to prevent the desecration of the flag, but the House did not act on them.³¹

²⁹ 39 Stat. 900. Although there was some suggestion that the legislation should extend to the entire United States, the existence of state legislation on the subject was perceived as diminishing the need for national legislation, which if necessary, could "be brought in at a later day." 54 Cong. Rec. 1728 (Sen. Pomerene).

³⁰ S. Rep. No. 130, 77th Cong., 1st Sess. 2 (1941) (reprinting excerpts from March 5, 1941 letter from Attorney General Robert H. Jackson). The full letter from the Attorney General is on file at the National Archives.

³¹ S. 218, 77th Cong., 1st Sess. (1941); 87 Cong. Rec. 3044 (1941) (Senate passage); S. 369, 78th Cong., 1st Sess. (1943); 89 Cong. Rec. 5874 (1943) (Senate passage).

Although the Congress did not then enact a flag protection law, it did approve in 1942 a joint resolution "to codify and emphasize existing rules and customs pertaining to the display and use of the flag of the United States of America."³² Patriotic societies had lobbied the Congress for this code since shortly after the First World War. When the code was first presented to the Congress in the 1920s, its proponents were careful to point out that it did not provide for penalties because it involved the kind of conduct that should not be mandated. "For instance," the resolution's sponsor testified, "you would not wish to arrest or to penalize anybody for not saluting the flag, perhaps, or for not saluting it in the proper way."³³ Intended to "provide an authoritative guide to those civilians who desire to use the flag correctly," H.R. Rep. No. 2047, 77th Cong., 2d Sess. (1942), the code as adopted by the Congress was only "recommendatory."³⁴

The Congress's decision in 1942 to adopt only a recommendatory code on observance of the flag proved consist-

³² Joint Resolution of June 22, 1942, ch. 435, 56 Stat. 377 (codified as amended at 36 U.S.C. §§ 171-78 (1982)).

³³ *Hearing on H.R.J. Res. 11 Before the House Comm. on the Judiciary*, 70th Cong., 1st Sess. 4-5 (1928) (Rep. Brand).

³⁴ *Id.* During World War I, the Congress had enacted temporary legislation concerning loyalty to government institutions that reflected a very different, but short-lived approach. The 1918 amendment to the Espionage Act of 1917 prohibited, "when the United States is at war," the uttering, printing, writing, or publishing of any "disloyal" language that was either about the form of government, Constitution, military forces, or flag of the United States, or that was intended to bring them "into contempt, scorn, contumely, or disrepute." Act of May 16, 1918, ch. 75, 40 Stat. 553, *amending* the Espionage Act of June 15, 1917, ch. 30, § 3, 40 Stat. 217, 219. Similar to the 1917 flag law for the District of Columbia, which prohibited the casting of contempt on the flag "by word," but unlike any subsequent federal legislation involving the flag, the 1918 amendment prohibited some verbal expression about the flag. In addition to ensuring that by its terms the prohibition was in effect only temporarily, the Congress precluded its application to future conflicts by repealing it in the legislation that terminated the war with Germany. Joint Resolution of March 3, 1921, ch. 136, 41 Stat. 1359, 1360.

ent with this Court's decision in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), the next year. In invalidating a West Virginia regulation that required public school children to salute the flag and overruling its decision in *Minersville School District v. Gobitis*, 310 U.S. 586 (1940), the Court held that the government could not constitutionally compel an individual "to communicate by word and sign his acceptance of the political ideas [the flag] bespeaks." *Barnette*, 319 U.S. at 633. Flag salute rules were "unique in the history of Anglo-American legislation . . . [f]or by this law the state seeks to coerce these children to express a sentiment which, as they interpret it, they do not entertain, and which violates their deepest religious convictions." *Gobitis*, 310 U.S. at 601 (Stone, J., dissenting). In contrast, "[t]he action of Congress in making flag observance voluntary," *Barnette*, 319 U.S. at 638, reflected the same understanding of the appropriate limitations on legislation as this Court expressed in *Barnette*, namely, that "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Id.* at 642.

5. DURING THE VIETNAM WAR THE CONGRESS ENACTED A FLAG DESECRATION STATUTE THAT PROHIBITED ONLY THE PHYSICAL DESECRATION OF THE FLAG, AND THIS COURT CORRESPONDINGLY NARROWED THE PERMISSIBLE REACH OF STATE FLAG DESECRATION STATUTES

After the Second World War, the question of national flag legislation lay dormant until the late 1960s when the Congress legislated in response to incidents of public flag burning in the United States and by American citizens in foreign countries.³⁵ Several factors contributed to the Congress's interest in "extending Federal protection to our national flag," *id.*, after having for years left the matter to the states. Members were convinced by correspondence from servicemen that "[t]he public act of dese-

³⁵ See S. Rep. No. 1287, 90th Cong., 1st Sess. 2, reprinted in 1968 U.S. Code Cong. & Admin. News 2507, 2508.

cration of our flag tends to undermine the morale of American troops." 113 Cong. Rec. 16459 (1967) (Rep. Wiggins). Aware of burnings of the American flag in foreign countries, members were also concerned about the ability of the Department of State to demand apologies from other countries when nothing was done to prevent the flag's desecration at home. *Id.* at 16458 (Rep. Shriver). Because there were reports that some Americans were responsible for flag burnings in other countries, there was an interest in the Congress in prohibitions that would apply to United States citizens abroad.³⁶

The Congress first considered proposals to extend nationwide the 1917 District of Columbia flag law by making it an offense anywhere "publicly [to] mutilate, deface, defile or defy, trample upon or cast contempt either by word or act," the flag.³⁷ Attorney General Ramsey Clark advised, however, that "[p]articular care should be exercised to avoid infringement of free speech. To make it a crime if one 'defies' or 'casts contempt * * * either by word or act' upon the national flag is to risk invalidation. . . . Phrases prohibiting speech are in fact unnecessary to accomplish the goal of prohibiting direct acts of disrespect or desecration, because the remaining language comprehensively describes such acts."³⁸

Accepting the Attorney General's advice, the Congress enacted a nationwide flag desecration law limited to "[w]hoever knowingly casts contempt upon any flag of the United States by publicly mutilating, defacing, defiling, burning, or trampling upon it."³⁹ The House and Senate

³⁶ See S. Rep. No. 90-1287, at 2, reprinted in 1968 U.S. Code Cong. & Admin. News at 2508.

³⁷ See *Desecration of the Flag: Hearings on H.R. 271 and Similar Proposals Before Subcomm. No. 4 of the House Comm. on the Judiciary*, 90th Cong., 1st Sess. 1-27 (1967) (House bills).

³⁸ S. Rep. No. 90-1287, at 5, reprinted in 1968 U.S. Code Cong. & Admin. News at 2511.

³⁹ Pub. L. No. 90-381, 82 Stat. 291 (1968) (codified at 18 U.S.C. § 700 (1988) (amended 1989)).

Judiciary Committees reported their belief that the law would withstand constitutional challenge because it

does not prohibit speech, the communication of ideas or political dissent or protest. The bill *does not* prescribe orthodox conduct or require affirmative action. The bill *does* prohibit public acts of physical dishonor or destruction of the flag of the United States. The language of the bill prohibits intentional, willful, not accidental or inadvertent public physical acts of desecration of the flag. Utterances are not proscribed.⁴⁰

The law not only eliminated all reference to contempt of the flag "by words," but also eliminated the provision, which had been part of the 1917 District of Columbia statute and was prevalent in the states, that allowed for the punishment of an unlimited category of contemptuous acts; instead, the statute's ambit was limited to the specific acts listed. The Congress also did not carry forward the provision of the 1917 District of Columbia law, also prevalent in the states, which made it an offense to misuse the flag by placing any word or picture on it.⁴¹

In the six years after the enactment of the 1968 flag law, this Court reversed, or affirmed the reversal of, three convictions under older state flag laws. The Court's decisions—*Street v. New York*, 394 U.S. 576 (1969), *Smith v. Goguen*, 415 U.S. 566 (1974), and *Spence v. Washington*, 418 U.S. 405 (1974) (per curiam)—dealt with aspects of state laws (mirrored also in provisions of the 1917 District of Columbia law) which had *not* been carried forward into the nationwide desecration law that the Congress enacted

⁴⁰ H.R. Rep. No. 350, 90th Cong., 1st Sess. 3 (1967) (emphasis in original); S. Rep. No. 90-1287, at 3, reprinted in 1968 U.S. Code Cong. & Admin. News at 2509.

⁴¹ In passing the 1968 act, the Congress deleted the mutilation provision from the District of Columbia flag law which, as modified, is codified in 4 U.S.C. § 3 (1988). It borrowed from the District of Columbia flag law and adopted as part of the new nationwide flag desecration law the broad definition of the flag contained in the District of Columbia law. Compare 18 U.S.C. § 700(b) (1988) with 4 U.S.C. § 3 (1988).

in 1968. This Court's constitutional rulings during that period, together with decisions which this Court let stand, effectively limited the permissible scope of state flag laws to the ambit of the new federal law, namely, proscriptions on the physical destruction of flags.

a. This Court Overturned Convictions Not Based on Physical Harm to the Flag

In *Street v. New York*, 394 U.S. 576, this Court invalidated a New York statute which made it an offense to "cast contempt" upon a flag "by words," terms which the Congress had excised in adopting the federal flag statute the prior year. Street, a World War II veteran, had been convicted under that statute when, in protest of the shooting of civil rights leader James Meredith, he burned a flag and then told a crowd that had gathered, "If they let that happen to Meredith we don't need an American flag." *Id.* at 579. Without reaching Street's broader contention that the law was unconstitutional because destruction of the American flag as a means of protest was protected expression, the Court held that the statute was unconstitutionally applied to him because it permitted him to be punished "merely for speaking defiant or contemptuous words about the American flag." *Id.* at 581. State courts conformed to *Street* by enforcing flag statutes only "insofar as [they] render[] criminal the *act* of any person who publicly mutilates, defaces or defiles the flag."⁴²

Then, in *Smith v. Goguen*, 415 U.S. 566, this Court held that language in the Massachusetts flag statute that made it an offense to "treat[] contemptuously" the flag

⁴² *People v. Burton*, 27 N.Y.2d 198, 201, 316 N.Y.S.2d 217, 218, 265 N.E.2d 66, 66 (1970) (affirming conviction for burning flag) (emphasis in original), *appeal dismissed*, 402 U.S. 991 (1971); *People v. Cowgill*, 274 Cal.App.2d 923, 926, 78 Cal. Rptr. 853, 855 (1969) (construing prohibition in California statute against "defiling" flag to apply only to "acts of desecration and disgrace" and affirming conviction for cutting up flag and sewing into a vest) (emphasis in original), *appeal dismissed*, 396 U.S. 371 (1970) (per curiam).

was unconstitutionally vague and affirmed the reversal of Goguen's conviction for wearing a flag sewn to the seat of his pants. The infirmity of the Massachusetts provision was that "it subjected [Goguen] to criminal liability under a standard so indefinite that police, court, and jury were free to react to nothing more than their own preferences for treatment of the flag." *Id.* at 578. As described above, the Congress in enacting the 1968 federal flag law determined not to carry forward into that law a similarly indefinite provision of the 1917 District of Columbia law that made it an offense to "cast contempt [by] act" upon the flag. This Court took note of that decision, observing that "nothing prevents a legislature from defining with substantial specificity what constitutes forbidden treatment of United States flags," *id.* at 581-82, and pointing out that the 1968 federal flag desecration statute "reflects a congressional purpose to do just that." *Id.* at 582 n.30 (legislative history of the 1968 federal law demonstrates a clear desire "to reach only acts that physically damage the flag"). Understanding that the Massachusetts court "necessarily limited the scope of the statute to protecting the physical integrity of the flag," Justice Blackmun, joined by Chief Justice Burger, would have upheld the constitutionality of Goguen's conviction. *Id.* at 591 (dissenting).

Shortly thereafter, in *Spence v. Washington*, 418 U.S. 405, this Court reversed a conviction under Washington's improper use statute for displaying a flag with a peace symbol temporarily attached in black tape to the flag. Like Washington, most states had barred the printing, painting, or affixing of words or pictures on flags since the early part of the century in response to the use of the flag in commercial advertising and for campaign banners, and Congress had included a misuse provision in the 1917 District of Columbia statute. Noting that no charge had been made under Washington's flag desecration statute and that Spence did not "permanently disfigure the flag or destroy it," the Court held that "in light of the fact

that no interest the State may have in preserving the physical integrity of a privately owned flag was significantly impaired on these facts, the conviction must be invalidated." *Id.* at 415. But just as *Street v. New York* and *Smith v. Goguen* had no direct bearing on the flag act passed by the Congress in 1968, neither was *Spence* applicable to the 1968 act, which contained no provision prohibiting the temporary affixing of materials to the flag.

b. This Court Let Stand Convictions for Physical Harm to the Flag

The gradual pruning of problematic provisions of state flag laws culminated in this Court's decision to decline review for want of a substantial federal question state court decisions upholding convictions for physical harm to the flag.⁴³ In *State v. Farrell*, 209 N.W.2d 103 (Iowa 1973), the Iowa Supreme Court had assumed that a woman who participated in flag burning as part of a student demonstration to protest the Indo-China War and the presence of the R.O.T.C. on campus had engaged in protected expressive activity, but nevertheless had affirmed her conviction under Iowa's flag statute, which it limited to physical acts of flag desecration. On appeal, this Court remanded for further consideration in light of its decision in *Spence*; Chief Justice Burger, and Justices White, Blackmun, and Rehnquist would have affirmed the conviction without further briefing and oral argument. 418 U.S. 907 (1974). On remand, the Iowa Supreme Court concluded that *Spence* was distinguishable because it concerned the "nonmutilative removable taping of a peace symbol on a flag then displayed on defendant's privately occupied premises." 223 N.W.2d 270, 271 (Iowa

⁴³ The Court also had declined to review a federal court decision that the 1968 federal flag law was applied constitutionally to an individual who had torn a flag. *Joyce v. United States*, 454 F. 2d 971 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 969 (1972). Other federal courts had upheld convictions under the 1968 federal law for flag burning. See *United States v. Crosson*, 462 F. 2d 96 (9th Cir. 1972); *United States v. Ferguson*, 302 F. Supp. 1111 (N.D. Cal. 1969).

1974) (emphasis omitted). In contrast, the Iowa case “unquestionably involved the mutilation by burning of a United States flag in a public place.” *Id.* The Iowa Supreme Court reaffirmed the conviction, and this Court dismissed the appeal from that judgment for want of a substantial federal question. 421 U.S. 1007 (1975).

In a parallel disposition, an Illinois appellate court had affirmed the convictions for “publicly mutilating a flag” of three individuals who burned a flag to protest against the invasion of Cambodia and the deaths at Kent State. *People v. Sutherland*, 9 Ill. App. 3d 824, 292 N.E.2d 746 (1973). On appeal, this Court remanded for reconsideration in light of its decisions in *Smith v. Goguen* and *Spence*; Chief Justice Burger, and Justices White, Blackmun, and Rehnquist again stated that they would have affirmed the convictions without further briefing and oral argument. 418 U.S. 907 (1974). On remand, the Illinois court observed that, in contrast to *Spence*, the facts before it implicated a legitimate government interest. The court distinguished *Smith v. Goguen* on the ground that “[n]o allegation of physical desecration was made there as in the case at bar.” The court reaffirmed the convictions for flag burning, 29 Ill. App. 3d 199, 329 N.E.2d 820 (1975), and this Court dismissed the appeal from that decision for want of a substantial federal question. 425 U.S. 947 (1976).

6. THE FLAG PROTECTION ACT OF 1989 WAS ENACTED IN RESPONSE TO THIS COURT'S DECISION IN *TEXAS V. JOHNSON* TO ASSURE THAT THE FEDERAL FLAG LAW IS CONTENT-NEUTRAL

As other state courts had done in the early 1970s, the Texas courts had narrowed the state flag desecration statute, which had been similar to that of most other states, *Delorme v. State*, 488 S.W.2d 808 (Tex. Cr. App. 1973) (enforcing statute as if “word or” from the phrase “cast contempt upon, either by word or act” had been omitted), and had affirmed convictions for physical destruction of the flag, *Deeds v. State*, 474 S.W.2d 718 (Tex. Cr. App. 1971) (flag burning). This Court had dismissed for want of a substantial federal question an appeal from a conviction

under the Texas statute so narrowed. *Van Slyke v. Texas*, 418 U.S. 907 (1974).

In 1973, however, Texas replaced that statute with one that had been suggested in a draft of the American Law Institute's Model Penal Code. That draft had proposed for consideration a criminal code section entitled “Desecration of Venerated Objects” and defined “desecration” as “physically mistreating in a way that the actor knows will seriously offend persons likely to observe or discover his action.” American Law Institute, Model Penal Code, Tentative Draft No. 13, at 39, § 250.4 (1961).⁴⁴ It was the law that Texas based on this draft, which differed considerably from the 1968 federal flag law and the general body of state flag laws, that this Court held in *Texas v. Johnson*, 109 S.Ct. 2533 (1989), could not be applied constitutionally to an individual who burned a flag as part of a political demonstration.

In *Texas v. Johnson*, this Court considered the application of Texas's venerated objects statute to Gregory Johnson's burning of a flag as the culmination of a political demonstration during the 1984 Republican National Convention. The Court observed that under the Texas statute “[w]hether Johnson's treatment of the flag violated Texas law . . . depended on the likely communicative impact of his expressive conduct,” and concluded that “Johnson's political expression was restricted because of the content of the message he conveyed.” 109 S.Ct. at 2543. Accordingly, the Court applied its “most exacting scrutiny,” *id.*, and concluded that Texas's interest in furthering the state's own view that the flag stands for “nationhood and

⁴⁴ The final version of the Model Penal Code, which the drafters recognized “mark[ed] a significant departure from prior law,” defined desecration as “physically mistreating in a way that the actor knows will outrage the sensibilities of persons likely to observe or discover his action.” American Law Institute, II Model Penal Code and Commentaries 411, 415 (1980). A few states have adopted this final version. *E.g.*, Colo. Rev. Stat. §§ 18-9-113, 18-11-204 (1986); Kan. Stat. Ann. § 21-4111 (1988); Haw. Rev. Stat. § 711-1107 (1988); Del. Code Ann. tit. 11, § 1331 (1987).

national unity" was not sufficiently compelling to outweigh Johnson's first amendment interests. *Id.* at 2548. In reaching this conclusion, the Court observed that "[t]he Texas law is . . . not aimed at protecting the physical integrity of the flag in all circumstances, but is designed instead to protect it only against impairments that would cause serious offense to others." *Id.* at 2543. In this regard, the Court took particular note of Justice Blackmun's dissenting opinion in *Smith v. Goguen*. *Id.* at 2543 n.6.

Concerned with the possible impact of *Texas v. Johnson* on the existing federal flag statute, members of Congress immediately began to explore ways to protect the flag.⁴⁵ Throughout a four-month period in 1989, members of the Congress, with the input of scholars, witnesses, and the public, considered not only how to craft a statute consistent with *Texas v. Johnson*, but also considered once again the nation's interest in preserving the physical integrity of the flag.

Based on analysis of this Court's first amendment decisions, the bills reported by the Judiciary Committees "respond[ed] to . . . *Texas v. Johnson* by amending the current Federal flag statute to make it content-neutral: that is, the amended statute focuses exclusively on the conduct of the actor, irrespective of any expressive message he or she might be intending to convey."⁴⁶ They provided that, "[as] amended, the Federal flag law would no longer require the actor to have 'cast contempt' or, for that matter, to have acted 'publicly.' Prosecution under the amended law would not in any way depend on the re-

⁴⁵ See *Statutory and Constitutional Responses to the Supreme Court Decision in Texas v. Johnson: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 101st Cong., 1st Sess. (1989); *Hearings on Measures to Protect the Physical Integrity of the American Flag: Hearings Before the Senate Comm. on the Judiciary*, 101st Cong., 1st Sess. (1989).

⁴⁶ H.R. Rep. No. 231, 101st Cong., 1st Sess. 2 (1989).

action of observers to the conduct."⁴⁷ The committees also were attentive to the concern over the broad definition of the flag contained in the 1968 federal statute and limited it to assure that only actual flags, and not designs or articles resembling them, came within the statute's reach.⁴⁸

While analyzing the doctrinal implications of *Texas v. Johnson*, members of the Congress also considered the purpose in preserving the symbol and the nature of the harm that flows from its destruction. From the testimony of witnesses and the statements of members it was evident that the Congress viewed its purpose as more inclusive than Texas's goal of furthering the state's own view of the flag. As Representative Edwards summarized, "The flag is worthy of protection not because it represents any one idea. . . . As the testimony of witnesses indicated, the flag means different things to different people. The bill does not foster any one view of what the flag represents." 135 Cong. Rec. H5502 (daily ed. Sept. 12, 1989). It also was evident that the Congress was not concerned, as Texas had been, with harm that results from expression of an offending message, but rather with harm caused by destruction of the flag itself. See S. Rep. No. 101-152, at 4, 1989 U.S. Code Cong. & Admin. News at 613. The bills reported by the Judiciary Committees reflected this understanding by protecting "the physical integrity of the flag

⁴⁷ S. Rep. No. 152, 101st Cong., 1st Sess. 10, reprinted in 1989 U.S. Code Cong. & Admin. News 610, 619. On the floor, the Senate rejected an amendment to limit the flag protection statute to public acts of physical harm. 135 Cong. Rec. S12655 (daily ed. Oct. 5, 1989). In opposing the amendment, Senator Joseph R. Biden, Jr., emphasized the importance of protecting the physical integrity of the flag in all circumstances, not just in those in which destruction of the flag would have a "communicative impact." *Id.* at S12620 (daily ed. Oct. 4, 1989).

⁴⁸ See Pub. L. No. 101-131, 103 Stat. 777 (limiting to flags "in a form that is commonly displayed"); H.R. Rep. No. 101-231, at 11 & n.12 (explaining that the statute excludes from coverage such items as photographs of flags or items decorated with images of the flag).

in all circumstances." *Id.* at 13, 1989 U.S. Code Cong. & Admin. News at 622.

Perceiving the Flag Protection Act as a way, consistent with the first amendment, of "recogniz[ing] the deeply held feelings of a vast majority of citizens for the physical integrity of all American flags," the House overwhelmingly passed the measure on September 12, 1989.⁴⁹ The Senate then passed it on October 5, 1989, after adding to the list of prohibited conduct.⁵⁰ When the bill returned to the House for final passage on October 12, 1989, Representative Brooks reminded the House of the "intent[ion] to make this provision of Federal criminal law 'content neutral.' It is the act of harming the physical integrity of the flag, rather than any message the actor might be attempting to convey, that is to be punished by 18 U.S.C. 700 as we are amending it." ⁵¹

Through the Flag Protection Act, tailored to address only harm to the physical integrity of the flag, the Congress concluded a process of narrowing the scope of the model law that the American Flag Association had circulated at the turn of the century. That narrowing process had commenced with the Attorney General's advice in 1968 to limit the scope of the federal statute to conduct, and was continued by the courts, which invalidated provisions of state laws or narrowly construed them to apply only to harm to the physical integrity of the flag. In the Flag Protection Act of 1989, the Congress returned flag

⁴⁹ 135 Cong. Rec. H5502, H5562 (daily ed. Sept. 12, 1989) (remarks of Rep. Edwards and passage).

⁵⁰ The Senate added two activities to the list of prohibited conduct: "physically defiles" and "maintains on the floor or ground." During the debate on the amendment on "physically defiles," it was emphasized that, in keeping with the other enumerated acts, defilement would have to be physical to come within the act's reach. *See, e.g.*, 135 Cong. Rec. S12618 (daily ed. Oct. 4, 1989) (remarks of sponsor Sen. Wilson).

⁵¹ 135 Cong. Rec. H6991, H6997 (daily ed. Oct. 12, 1989) (remarks of Rep. Brooks and final passage). The bill became law without the President's signature on October 28, 1989.

desecration legislation to the core concern reflected in a number of the first flag statutes adopted following the violence during the 1896 campaign—protecting the physical integrity of the flag without regard to the actor's purpose.

7. THE HISTORICAL DEVELOPMENT OF THE FLAG PROTECTION ACT OF 1989 DEMONSTRATES THAT THE ACT PROTECTS THE FLAG IN A CONSTITUTIONALLY PERMISSIBLE MANNER

For nearly a century, since Pennsylvania became the first state to act legislatively in response to violence against the flag during the 1896 presidential campaign, the destruction of the United States flag has been viewed as conduct that causes serious harm to the nation, irrespective of the views of particular actors. The Flag Protection Act of 1989 continues the sustained nationwide effort to prevent that harm, and does so in a way that is respectful of first amendment interests. As we indicated at the beginning of this argument, our brief is provided for the Court's consideration in conjunction with those of the appellant and other supporting amici and, rather than reiterate arguments advanced elsewhere, we leave to those briefs the full articulation of the manner in which the Act comports with the first amendment decisions of this Court.⁵² In this concluding section, we will

⁵² Our briefs in district court presented an analysis of the law that parallels the amicus brief submitted to this Court by Senator Biden, Chairman of the Senate Committee on the Judiciary. We adhere to that analysis, namely that the Flag Protection Act is content-neutral, that it serves a significant governmental interest, and that it allows ample alternative means of expression.

In our briefs below, we also advanced an argument supportive of the appellant's argument that some expression is not entitled to full first amendment protection. In this regard, we argued that it is worth recalling how the doctrine which equates some conduct with speech evolved. The doctrine's origin is usually credited to *Stromberg v. California*, where the Court overturned a statute that permitted a conviction for the display of a red flag in circumstances that might include "peaceful and orderly opposition to government." 283 U.S. 359, 369 (1931). It has been traced through *Brown v. Louisiana*, which involved a silent demonstration in a segregated library. 383 U.S. 131, 139 (1966) (demonstrators "sat and stood in the room, quietly, as monuments of

Continued

draw together several themes from the nation's experience with flag protection legislation in aid of the Court's consideration of the doctrinal arguments developed more completely in other briefs.

At the threshold, the 1989 flag law should be assessed in the context of its predecessor enactments. The 1989 law modifies the 1968 flag law. That law, in turn, was modeled after portions of the 1917 flag law for the District of Columbia, which was drawn in turn from the American Flag Association's 1900 model act. The model act was, indeed, the model for a large number of state enactments, and also for the uniform flag law promulgated by the Commissioners on Uniform State Laws in 1917. Although the Congress has narrowed the reach of its flag law from the version that most states adopted, the Congress has always perceived federal and state law on the

protest against the segregation of the library"). *Tinker v. Des Moines Independent Community School District* applied the doctrine to wearing armbands in circumstances "entirely divorced from actually or potentially disruptive conduct by those participating." 393 U.S. 503, 505 (1969). Then, in *Spence v. Washington*, the doctrine was applied to the affixing of a temporary peace symbol on a flag by a student whose manner the Court said "can fairly be described as gentle and restrained." 418 U.S. at 414 n.10. Only in *Street v. New York* and *Texas v. Johnson* has the Court protected expression associated with acts of destruction, but in *Street* protection was provided because the defendant may have been convicted for his words and in *Texas v. Johnson* because an element of the state crime was whether the defendant's action caused serious offense to others. This Court has written that "[w]e cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *United States v. O'Brien*, 391 U.S. 367, 376 (1968).

Finally, with respect to the argument of the Speaker and Leadership Group of the House of Representatives that the government has a sovereignty interest in the flag, we view the historical discussion in support of that argument as complementary to the discussion in this brief, and one which helps to explicate why the very first House report in 1890 in support of protective legislation described the flag as "the symbol of our national existence, power, and sovereignty." H.R. Rep. No. 51-2128, *supra* pp. 7-8, at 1.

protection of the flag to serve common objectives. S. Rep. No. 90-1287, at 2, 1968 U.S. Code Cong. & Admin. News at 2508 ("State jurisdiction in this matter should not be displaced."); H.R. Rep. No. 90-350, *supra* n.40, at 1 ("the national emblem should be given concurrent Federal protection"). An understanding of the federal flag law requires, therefore, an understanding of the objectives of the flag protection movement that achieved extraordinary success in the states at the turn of the century.

The flag protection movement that began to sweep the nation at the end of the last century had nothing to do with the suppression of dissent. Concern about the flag had mounted for years in response to commercial exploitation of it, but the rapid enactment of protective laws in the states followed from violence during the 1896 campaign in which Democrats and Republicans, "each assuming that they alone represented the patriotism of the country," *see supra* p. 10, trampled each other's flags or shot at them. The appellees in these cases are deeply concerned about a range of contemporary issues—laws on abortion and homosexuality (J.A. 47), a strike at an aircraft plant (J.A. 75), the plight of the homeless (J.A. 77), and others—but flag laws are not directed at such protests. Indeed, from the outset, proponents of flag legislation made clear that their purpose was "NOT to make our citizens loyal," but "TO REGULATE the actions of those who [destroyed flags] without a disloyal thought, unthinkingly." *See supra* p. 11.

The society's interest in protecting the integrity of the flag has remained essentially unchanged since concerns about commercial exploitation of it were first raised in the late nineteenth century. Just as Senator William S. Cohen spoke of the flag in debate last October as "unique, a special emblem of our principles and ideals, and of our Nation's struggle for freedom," 135 Cong. Rec. S12582 (daily ed. Oct. 4, 1989), in 1890 the first House report on flag protection urged that the flag be protected because "[i]t is the emblem of freedom and equality. . . . It is a

reminder of American fortitude, courage, and heroism, and of the suffering and sacrifices on land and sea which have been endured for its preservation and for the preservation of the country it represents." *See supra* pp. 7-8.

In large part the debate about flag legislation has not been whether the government has an interest in preserving the flag as a national symbol, but about the strength of that interest and whether there is any danger to it if the flag's destruction is not prohibited. As to the strength of the interest, it is demonstrated by the sustained effort for decades "to keep our flag sacred and free from any alteration or desecration whatever." *1900 Circular, supra* n.15, at 16. As to whether there is danger to the effectiveness of the flag as a symbol if subject to uncontrolled violence against it, any judgment is likely to be subjective. Nevertheless, our nation's history has demonstrated that the flag is a potent symbol of the right of the people to petition peacefully for the redress of grievances.⁵³ That being so, among the principal actors in our government of separated powers, certainly legislators who partake regularly in public debate are well positioned to assess the danger to civic discourse that may arise when violence against that symbol threatens "to fill the marketplace of ideas with the sound of thudding fists." *Joyce v. United States*, 454 F.2d at 987-88.

It is of course a matter of fair debate whether legislation to protect the flag is needed. Attorney General Clark, even as he advised the Congress on steps it should take to write a constitutional flag law in 1968, asked the Congress to consider whether the need for one had been demonstrated, and expressed his doubts. Nevertheless, he firmly recognized that, "[w]hether a Federal criminal

⁵³ A few photographs from this century make that point. As suffragists marched down Pennsylvania Avenue in 1913 to protest the denial of the right to vote, they carried the United States flag aloft, "through a dense mob of hostile humanity." *An Illustrated History of The City of Washington* 362 (T. Froncek ed. 1977). In 1965, the flag was carried on the march from Selma to Montgomery. J. Williams, *Eyes on the Prize* 250-51 (1987).

statute is the proper redress for the injury inflicted on the Nation when the flag is burned and whether it would serve as a needed deterrent against further transgressions is a question for the Congress." S. Rep. No. 90-1287, at 4, 1968 U.S. Code Cong. & Admin. News at 2510. This Court in *Halter* believed that the fact that more than half of the states had adopted statutes similar to Nebraska's was "of such significance as to require us to pause before reaching the conclusion that a majority of the States have, in their legislation, violated the Constitution of the United States." 205 U.S. at 40. The Congress has resolved the question that Attorney General Clark recognized was for it to decide, and nearly all states have proscribed the physical destruction of the flag without the language used in Texas's singular statute.

The century-long history of flag legislation is also instructive about the manner in which the Flag Protection Act has been crafted to achieve its objectives without trenching on first amendment values. The states took two paths in the immediate aftermath of the 1896 campaign. One utilized legislation that, apart from restrictions on the use of the flag in advertising, dealt solely with physical assaults on flags. The other also proscribed defiance of the flag or, without limiting definitions, contempt by words or acts on the flag. Many of the states and the Congress, in 1917 for the District of Columbia, chose the second path.

In the Flag Protection Act of 1989, the Congress has completed a process of evolution and has come to focus exclusively on protecting the physical integrity of the flag in all circumstances. First, in World War II, while states sought to compel loyalty to the flag, the Congress, recognizing that such loyalty could not be coerced, enacted only recommendatory legislation for flag ceremonies, a decision acknowledged approvingly by this Court in *Barnette*. Then, in enacting nationwide flag protection legislation in 1968, the Congress excised from its statute several expansive provisions found in state flag laws, includ-

ing restrictions on verbal expression and vague terms describing the prohibited conduct. The wisdom of those actions was confirmed by this Court's flag decisions over the next several years in which the Court invalidated a number of provisions of state flag laws. Most recently, when this Court found unconstitutional Texas's flag legislation that singled out offending views for punishment, the Congress quickly acted to tailor its law.

As a result of the Congress's attentive narrowing of flag legislation, the federal law now addresses only conduct that harms the interest recognized since 1896 by state legislators, the Congress, and members of this Court, namely, protecting the physical integrity of the flag. As a result, the Act leaves available limitless alternative means of communication, many of which involve the flag. A person may denounce the flag, fly it upside down or in inferior positions, or display it with a variety of temporary symbols attached to it. Although some individuals may prefer destruction of the flag to communicate their ideas, the Court has never accepted the proposition, as long as the government's regulation is viewpoint neutral, "that people who want to propagandize protests or views have a constitutional right to do so whenever and *however* and wherever they please." *Adderley v. Florida*, 385 U.S. 39, 48 (1966) (emphasis added). The Act limits only activity that is the source of the harm the Congress has identified, without restricting expressive activity that does not cause that harm.

CONCLUSION

The judgments of the district courts should be reversed.

Respectfully submitted,

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APRIL 1990.

○

MAY 2 1990

JOSEPH F. SPANIOLO, JR.
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

UNITED STATES OF AMERICA,

—v.—

Appellant,

SHAWN D. EICHMAN, *et al.*,

Appellees.

UNITED STATES OF AMERICA,

—v.—

Appellant,

MARK JOHN HAGGERTY, *et al.*,

Appellees.

ON APPEALS FROM THE UNITED STATES DISTRICT COURTS FOR THE
DISTRICT OF COLUMBIA AND THE WESTERN DISTRICT OF WASHINGTON

**BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL
LIBERTIES UNION, ACLU OF THE NATIONAL
CAPITAL AREA, ACLU OF WASHINGTON, AND
THE AMERICAN JEWISH CONGRESS
IN SUPPORT OF APPELLEES**

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INTEREST OF *AMICI*¹

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with over 275,000 members dedicated to preserving the principles of liberty and equality embodied in the Bill of Rights. The ACLU of the National Capital Area and the ACLU of Washington are local affiliates in the judicial districts where these cases arose.

Since its founding in 1920, the ACLU has been a vigorous advocate of the right of free expression. In that role, the ACLU has appeared before this Court in scores of First Amendment cases, both as direct counsel and as *amicus curiae*. Like last year's decision in *Texas v. Johnson*, 491 U.S. ___, 109 S.Ct. 2533 (1989), these cases raise fundamental issues about political protest in a free society. The outcome of these cases is therefore a matter of central concern to the ACLU.

The American Jewish Congress is a national organization of American Jews founded in 1918 to protect the civil, religious, economic and political rights of American Jews. The carrying out of those purposes presupposes a broad right to freedom of speech, particularly political speech. American Jewish Congress has therefore consistently opposed efforts, such as the one at issue here, to narrow the scope of those freedoms.

¹ Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

STATEMENT OF THE CASE

The Flag Protection Act of 1989² was passed in swift response to this Court's decision in *Texas v. Johnson*, 109 S.Ct. 2533 (1989). Johnson had burned an American flag as part of a demonstration against Reagan administration policies. The Court overturned as violative of the Constitution his conviction under a Texas statute making it a crime to "deface, damage, or otherwise physically mistreat in a way the actor knows will seriously offend one or more persons likely to observe or discover his actions." *Id.* at 2537 n.1. Concerned about the implications of this decision for the validity of the federal flag protection statute, Congress held hearings and sought to devise a statute that would survive constitutional challenge. The Department of Justice took the position that no statute both comporting with the First Amendment and sufficient to protect the flag against insult could be devised, and that therefore a constitutional amendment was necessary. Others disagreed,³ and the statute at issue here was enacted into law without the President's signature. The President, who favored a constitutional amendment, stated "his serious doubts that [the legislation] can withstand Supreme Court review" 25 Weekly Comp. Pres. Doc. 1619 (October 26, 1989).

Appellees in these consolidated cases were charged with burning flags of the United States in violation of the Act. The charges relate to two separate incidents, one at a demonstration outside the Capitol in Washing-

² Pub.L.No. 101-131, 103 Stat. 777 (amending 18 U.S.C. § 700). The amended Act now provides, in pertinent part: "Whoever knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground or tramples upon any flag of the United States shall be fined under this title or imprisoned for not more than one year, or both."

³ Hearings on S. 1338, H.R. 2978, and S.J. Res. 180, August 1, 1989, Serial No. J-101-33, 101st Cong., 1st Sess. (Hearings).

ton, D.C., the other at a rally outside a post office in Seattle, Washington. Both incidents took place shortly after the Act became law on October 28, 1989.

It is alleged that the flag burned in the Seattle incident was the property of the United States Postal Service. That circumstance, however, was the subject of a separate charge of willfully injuring property of the United States. That charge is not before the Court in this case and was brought under a separate provision from the one involved here. *Amici* do not contest the validity of a statute making criminal the destruction of the flag when it is government property or the property of another. Nor is there an issue here about the propriety of more serious penalties for the destruction of the property of another, when that property might have special significance for its owners.

The likelihood that the acts charged here would provoke violent reactions or otherwise lead to a breach of the peace was not made part of the charge, was not considered below, nor would it have been relevant under the Act. Similarly, any words spoken in connections with the acts of flag-burning are, and under the Act must be, irrelevant to the charges brought. Thus, the only matter charged and the only issue presented is the burning of the flag itself.

The District Courts for the District of Columbia (June L. Green, J.) and for the Western District of Washington (Rothstein, J.) both concluded that the Act, as applied to appellees' conduct, violated the First Amendment of the United States Constitution, and accordingly granted the motions to dismiss the informations. Both courts concluded that the Act sought to punish expressive conduct, protected by the First Amendment, and that no governmental interest sufficiently compelling to survive strict scrutiny had been advanced to justify the Act. The courts rejected the argument of the United States that the very enactment itself and the President's call for a constitutional amend-

ment to overturn this Court's decision in *Johnson* were sufficient evidence of a compelling governmental interest. They rejected the argument of the United States Senate that though the purpose, indeed the only conceivable purpose of the Act, was to protect the value of the flag as a symbol, the fact that the Act made no reference to the actor's purpose was sufficient to make it content-neutral. The use of the criminal law to suppress expression, or (what comes to the same thing) to protect one form of symbolic expression and to prohibit another, is inherently content-related. Also rejected was the argument of the House of Representatives that the Act can stand as a protection of the flag as an incident and indicator of sovereignty. This argument, it was pointed out, is just an assertion in different words of the symbolic value of the flag and of the governmental interest in keeping that symbol from being appropriated to uses the government does not authorize.

Finally, Judge Rothstein rejected the Senate's argument that the Act might be valid under the proposal in Justice Blackmun's dissent in *Smith v. Goguen*, 415 U.S. 566, 590-91 (1974), regarding enactments aimed at protecting the flag's "physical integrity." Judge Rothstein noted that in the *Johnson* case the Court stated that the Texas statute was not designed to protect "the physical integrity of the flag in all circumstances," 109 S.Ct. at 2543, and that therefore the Court had not ruled whether a statute so drawn could withstand constitutional scrutiny. Judge Rothstein concluded that the Flag Protection Act also did not present this question, since it proscribes (though without mentioning the actor's motive) "types of conduct generally associated with disrespect for the flag" while failing to proscribe other kinds of conduct "which also threaten the physical integrity of the flag but which do not communicate a negative or disrespectful message, like flying the flag in inclement weather or carrying it into battle" J.S.App. at 11a-12a n.6.

SUMMARY OF ARGUMENT

A. The flag is nothing but a symbol. It is only sometimes government property. It is not part of some regulatory scheme -- like the draft card in *United States v. O'Brien*, 391 U.S. 367 (1968), or Little Bird of the Snow's social security number in *Bowen v. Roy*, 476 U.S. 693 (1986). A symbol is only a form of communication. It communicates emotions, ideas, or attitudes. Communicating is what symbols do. And if something is only a symbol it does nothing else than communicate. The strong emotions displayed in the dissent in *Texas v. Johnson* and in the debates on this Act were all concerned with the meaning and power of a symbol, of an instantiated idea.

Burning the flag in the circumstances charged here was also nothing but a symbol. It too was an act of communication and only an act of communication. The crime charged here was not the destruction of another's property. It was not an interference with a government regulatory program. It was not an intrusion on the physical space or tranquility of others. It was not a nuisance or an act of environmental pollution. It was a statement. It was a statement without words -- as a picture, a melody, a statue, or a dance, a mime or a string of semaphore flags are statements without words. It was a statement that appropriated in its syntax the statement which is the flag -- another statement without words. It was a symbolic act, as displaying the flag is a symbolic act. Symbol for symbol. Symbol against symbol. Statement and counter-statement. Burning the flag was as much a statement without words as would be singing the national anthem out of tune. It was as much a statement as drawing a moustache on your own picture of George Washington.

What the government complains about is that appellees have committed blasphemy by desecrating a civic symbol of our nationhood. But our Constitution does

not permit the punishment of blasphemy. Blasphemy is nothing but the utterance (or counter-utterance) of a sentiment or idea inimical to ideas many of us hold sacred.

B. In the series of flag desecration cases beginning with *Street v. New York*, 394 U.S. 576 (1969), through last Term's decision in *Johnson*, dissenting opinions have offered a variety of arguments designed to escape the logic which inexorably leads to the conclusion that statutes such as the one at issue here are nothing but attempts to punish the expression of beliefs and the communication of ideas. It has been argued that such statutes are no less justified than forbidding a person to burn his "shirt or trouser or shoes on the public thoroughfare . . . as a protest against the Government's fiscal policies," *Street*, 394 U.S. at 616 (Fortas, J., dissenting). But, of course, neither here nor in those other cases were the protesters prosecuted under a statute designed to protect health and safety against the untoward effect of such acts of public mini-arson.

More seriously, it has been argued that flag desecration statutes acknowledge a kind of governmental proprietary interests in the flag akin to trademark or copyright. *Smith v. Goguen*, 415 U.S. at 602-03 (Rehnquist, J., dissenting). But it is quite clear that such proprietary interests are recognized to prevent confusion as to the origin of goods or to "promote the Progress of Science and useful Arts," U.S. Constitution, Article I, section 8, and not at all as a means of suppressing the use of particular words or symbols to express opinions disfavored by the government. That you may freely use another's image in a hostile counterstatement was a clear implication of the Court's recent recognition of the central communicative role of, and the corresponding First Amendment protection for, cartoons, satires and caricatures of public figures. *Hustler Magazine v. Falwell*, 485 U.S. 46, 52-55 (1988). Nor can flag desecration statutes be likened to

statutes regulating the reproduction or even the destruction of postage stamps, currency or securities or the unauthorized wearing of uniforms or service medals. *Smith*, 415 U.S. at 595-96. In all those cases the protection of the money supply and the prevention of fraud and confusion are the evident and sufficient justifications. Finally, no regulatory purpose akin even to the paper-thin regulatory justification adduced in *United States v. O'Brien*, 391 U.S. 367, is available or is offered here -- unless it is the forbidden one of regulating the communicative uses to which the flag is put.

The Solicitor General with commendable candor eschews any such labored justifications. Rather he argues that exceptions have always been recognized to the general principle that government may not proscribe expression because of its content -- i.e., that government may not engage in censorship. He instances child pornography, obscenity, false and defamatory speech, speech which is part of a scheme promoting illegal activity, speech leading directly and immediately to violence ("fighting words"). The Solicitor General asks, in effect, that the Court admit just one more exception. But, of course, this argument entirely misses the point of why those exceptions exist. Under this Court's decisions, where the expression is knowingly or recklessly but demonstrably untruthful, it does not contribute to the exchange of ideas. (As the *Hustler Magazine* case shows, where truth -- and thus falsity -- is not the issue, even the most outrageously expressed opinion merits protection, insofar as it does express an opinion.) Similarly, the Court has not regarded obscenity and child pornography as ideas at all -- and when they become ideas the Court has clothed them in First Amendment protection. By definition, they have some redeeming social significance. Finally, fighting words are denied protection not because of their content but because of their very tendency to provoke not thought or verbal response but im-

mediate, thoughtless violence.

So each of these instanced exceptions comes accompanied by a reason showing why, in this Court's judgment, it is not thought or expression which is the subject of regulation after all. The Solicitor General does not, however, offer any such accompanying rationale for adding flag desecration to this (very short) list of exceptions. He argues that the law allows some exceptions so why should it not allow just this one exception more? His reason is not that flag desecration is not political expression and so at the very heart of the First Amendment's concern; not that it in all circumstances has a powerful tendency to provoke immediate violence; not that it asserts palpable untruths. In the end his argument comes down to this: the flag is unique -- a kind of conceptual and constitutional singularity.

One hardly knows how to respond to such an argument, because of course it is not an argument at all. It is a plea that in this case the government be dispensed from the obligation of offering an argument validly distinguishing this case of criminalizing the pure expression of a hated opinion from every other such case, in which the prohibition would surely fail. Suffice it to say that the Solicitor General's demonstration of the flag's particular symbolic and expressive significance only makes more palpable the constitutional impropriety of putting it off limits for those symbolic and expressive uses of which the government does not approve.

C. In this brief we shall show (Point I) that what the Act forbids cannot be relegated to the fringes of the First Amendment assigned to low value speech, of which the only recognized examples are defamation, obscenity, child pornography, and more controversially advertising and so-called "fighting words." Rather the object of the Act is to prohibit expression at the very core of First Amendment concern: political expression offensive to

prevailing opinion and sentiment.

Next, we shall show (Point II) that the prohibitions of the Act are wholly and inescapably content-based. First, it is simply not possible to assign any intelligible purpose to the Act other than the prohibition of one form of expression because of what it expresses. Second, for the same reason the Act cannot be defended as a content-neutral time, place or manner regulation.

Finally, we draw the inescapable conclusion (Point III) that since no other purpose than the suppression of political expression is available to justify the Act, it cannot survive the strict scrutiny the First Amendment requires. Indeed, given the justifications that have been offered or can be imagined for the Act, it cannot survive First Amendment scrutiny at any level.

ARGUMENT

In *Texas v. Johnson*, 109 S.Ct. 2533, this Court declined Texas' invitation to exempt flag-burning from the "bedrock principle underlying the First Amendment": namely, "that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Id.* at 2544. The Court should likewise decline Congress' invitation here. The Flag Protection Act of 1989 infringes First Amendment liberties no less than did the Texas flag-desecration statute struck down in *Johnson*, and on the authority of that decision, should likewise be struck down.

All sides in this case agree that if flag-burning is punished on the basis of the idea or attitude that it expresses, the First Amendment invalidates the punishment. And so they must, for however fragmented on other points, this Court's four flag desecration rulings over the last two decades unequivocally unite on this

proposition.⁴ Faced with this difficulty, the Solicitor General and *amici curiae* supporting his position look to two routes of escape. The first is to attempt to categorize flag-burning out of the First Amendment as unprotected or marginal speech. The second is to portray the Flag Protection Act as regulation of the manner and not the content of expression.

Both these efforts to circumvent this Court's ruling in *Johnson* must be rejected. Here as in *Johnson*, the government seeks to protect the flag solely as a symbol. Here as in *Johnson*, the government would prohibit flag-burning solely for its value as a counter-symbol of political protest. And here as in *Johnson*, no justification for suppressing flag-burning other than symbolism is or can be offered. Accordingly, here as in *Johnson*, the government's attempt to forbid flag-burning must be subject to the strictest scrutiny and, under that scrutiny, must fall.

I. THE FLAG PROTECTION ACT FORBIDS POLITICAL SPEECH THAT LIES AT THE CORE OF THE FIRST AMENDMENT

The Solicitor General and *amici* in support of his position concede, as they must, that flag-burning in the circumstances of these cases constitutes "expressive conduct" or "symbolic speech" that was plainly and

⁴ In *Street v. New York*, 394 U.S. 576, and in *Smith v. Goguen*, 415 U.S. 566, this Court invalidated convictions for expressing a contemptuous view of the flag, whether by word (Mr. Street's statement "We don't need no damn flag") or deed (Mr. Goguen's wearing of the flag sewn to the seat of his pants). In *Spence v. Washington*, 418 U.S. 405 (1974), the Court invalidated a conviction for misusing a flag by taping a peace symbol on it -- a statement the Court deemed well "within the contours of the First Amendment," *id.* at 415. And in *Johnson*, of course, this Court invalidated a conviction for burning a flag so as to "seriously offend" others, a basis this Court readily held to be impermissibly content-based.

overtly political. Brief for the United States ("SG Brief") at 22, 28; *see also* Brief for Senator Joseph R. Biden, Jr. as *Amicus Curiae* ("Biden Brief") at 6, 8. Having made that concession, however, the Solicitor General seeks to trivialize flag-burning by categorizing it as speech with little or no value -- no matter how political it is. Flag-burning, argues the Solicitor General, should be relegated to the fringes of the First Amendment, along with "the lewd and the obscene, the profane, the libelous, and the insulting or 'fighting words.'" *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942), *cited in* SG Brief at 31-32 & n.25.

But this attempt to categorize flag-burning out of the First Amendment fails. Burning a flag to express symbolic dissent from one's government could hardly be closer to the core or farther from the fringe of the First Amendment. While it is true that this Court has carved out certain "well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem," *Chaplinsky*, 315 U.S. at 571, public political statements have never been included among them.

On any theory of the First Amendment, political speech -- and most importantly, political speech critical of government -- is located at the very core. This Court has long protected political dialogue in this country from the spectre of seditious libel and its analogues. Indeed, speech critical of government is the very paradigm of speech protected by the First Amendment. Protecting such speech is essential to freedom, for it ensures that no incumbent regime, no reigning orthodoxy, may entrench itself by undermining dissent.

Accordingly, when this Court has treated a category of expression as unprotected or of low value, and thus as regulable by the state on lesser justification, the Court has taken pains to distinguish such speech from high-value political speech at the core of the First Amend-

ment. For example, libel is unprotected only to the extent it inflicts injury without advancing truth or public debate. See *New York Times v. Sullivan*, 376 U.S. 254 (1964). Obscenity is unprotected only to the extent that it seeks sexual arousal and nothing more. See *Miller v. California*, 413 U.S. 15 (1973). Fighting words are unprotected only insofar as they amount to a punch in the nose -- not an expression of an idea or an opinion. See *Chaplinsky v. New Hampshire*, 315 U.S. 568. And advertising enjoys lesser First Amendment protection only insofar as it affects the hardy channels of commerce -- not the more fragile and therefore more protected channels of political change. See *Virginia State Board of Pharmacy v. Virginia Citizens Council*, 425 U.S. 748 (1976).

Flag-burning obviously does not literally fall within any of these existing categories of unprotected or less protected expression. Unlike commercial advertising, its marketplace is only that of political ideas, not goods and services. Unlike libel, it advances an opinion about government, not a falsehood about an individual. Unlike fighting words, flag-burning targets no individual human object and thus cannot "by [its] very utterance inflict injury" in the form of a face-to-face verbal assault. *Chaplinsky*, 315 U.S. at 572. For this reason, this Court flatly rejected the analogy of flag-burning to fighting words in *Johnson*: "No reasonable onlooker would have regarded Johnson's generalized expression of dissatisfaction with the policies of the Federal Government as a direct personal insult or an invitation to exchange fisticuffs." 109 S.Ct. at 2542. Finally, unlike obscenity, flag-burning is directed at evoking far more than a mere physiological response -- and has evoked far more, as the extended and highly articulate public debate both in and out of Congress in response to Gregory Lee Johnson's activities amply illustrates.

Nor can these categories of unprotected speech be extended to flag-burning even by analogy. Quite the

contrary, the concededly political character of the flag-burning encompassed by the Flag Protection Act rules out its "excision . . . from the realm of constitutionally protected expression." *New York v. Ferber*, 458 U.S. 747, 754 (1982), cited in SG Brief at 30. This is so even if flag-burning is deemed uncivil or impolite. See SG Brief at 36-37 & n.29 (claiming that flag-burning offends "decency and civility in discourse" and "the moral sensibility of the community"). For in public clashes over political ideas, dainty rules of etiquette and paternalistic protection of vulnerable sensibilities have long since been ruled out. Like Mr. Terminiello's race-baiting rabble-rousing, see *Terminiello v. Chicago*, 337 U.S. 1 (1949), Mr. Cohen's vulgar epithet against the draft, see *Cohen v. California*, 403 U.S. 15 (1971), and Mr. Flynt's scurrilous caricature of Mr. Falwell, see *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988), flag-burning merits the highest First Amendment protection notwithstanding the deep and well-founded offense it may provoke in its audience. Speech "may indeed best serve its high purpose when it induces a condition of unrest . . . or even stirs people to anger." *Terminiello*, 337 U.S. at 4. Nor does it matter that the medium chosen is deliberately provocative; as Justice Harlan wrote for the Court in *Cohen v. California*, "words are often chosen as much for their emotive as their cognitive force." 403 U.S. at 26.

In short, a dissident's flag-burning is high-value political speech at the core of the First Amendment, no less than a speech, a pamphlet, or a satiric cartoon. This Court has long kept the categories of unprotected speech few and narrowly cabined. The Solicitor General's invitation to add a new category -- call it "political obscenity" -- to that short list should be declined for, if accepted, it would truly be the exception that swallowed the rule.

The Solicitor General sweetens his request with the promise that the exception will be narrow; he asks in effect that the Court depart just this once from the firm

general principle that political speech may not be banned as such. But this argument will not do. First, it is essentially lawless. This Court rules by reason, and reason requires that departures from constitutional principles of general application should themselves be principled rather than *ad hoc*. On just that basis, this Court has steadfastly resisted and should continue to resist entreaties to create "a separate juridical category . . . for the American flag alone." *Johnson*, 109 S.Ct. at 2546.

Second, the effort to wall off flag-desecration as a class of one is in any event transparently unavailing. The experience of other nations, with different traditions of free speech and a far more sacral attitude towards the state and its symbols than our own, suggests that whatever can be said about the flag can be said as easily about a constitution, a national anthem, or a national leader. The English Statute of Treason once provided capital punishment for "compassing or imagining the death of the king." The French penal code today makes it an offense punishable by fine and imprisonment to offer insult to the President of the Republic by means of written words, images or broadcasts. Code Penal, Article 26, L. no. 72-546 de 1er juill. 1972. The German Federal Republic makes it a criminal offense to "defame[] the colors, the flag, the coat of arms or the anthem of the Federal Republic or of one of its [states]." Penal Code, section 90a (1987). And doubtless those who "defaced" the flags of the German Democratic Republic or of Romania in the events of 1989 by cutting from their centers their communist symbols committed grave offenses against those countries' then-existing political orders.

This is a direction in which our nation should not move -- not even one step. This Court has already given a full measure of First Amendment protection to statements compassing the death of our President: In *Rankin v. McPherson*, 483 U.S. 378 (1987), the Court held that

one could not be punished for saying, "[I]f they go for [President Reagan] again, I hope they get him." There, the sanction was only the loss of a public job, not the one year prison sentence possible here. And there, the contemplated subject was the flesh-and-blood President, not a likeness of the President on paper, canvas, or cloth. Surely it follows *a fortiori* that flag-burning must be given at least as much protection. In our free speech tradition, there is no such thing as the politically obscene.

II. THE FLAG PROTECTION ACT REGULATES SPEECH SOLELY BECAUSE OF ITS CONTENT

Texas v. Johnson reaffirmed emphatically that government may not forbid flag-burning on the basis of its message; the flag may not be preserved as a symbol "only in one direction." 109 S.Ct. at 2546. Accepting this holding, various government officials seek to escape its force by asserting that the Flag Protection Act targets no message and works in no one direction. See Biden Brief at 11-16; *Amicus Curiae* Brief of Governor Mario M. Cuomo ("Cuomo Brief") at 4-5, 6-7. These assertions of content-neutrality are untenable.

True, the Texas desecration statute at issue in *Johnson* predicated punishment on the flag-burner's knowledge that his action "will seriously offend one or more persons likely to observe or discover" it. 109 S.Ct. at 2537 n.1, quoting Texas Penal Code Ann. §42.09(b). The "seriously offend" clause led the Court readily to conclude that the Texas law was "content-based" and thus subject to "the most exacting scrutiny." As the Court wrote, "Johnson was prosecuted because he knew that his politically charged expression would cause 'serious offense' Whether Johnson's treatment of the flag violated Texas law thus depended on the likely communicative impact of his expressive conduct." 109 S.Ct. at

2543 (footnote omitted); see *Boos v. Barry*, 485 U.S. 312, 315 (1988).

True as well, the Flag Protection Act contains no "seriously offend" clause. But it simply does not follow, as *amici* Biden and Cuomo would have it (the Solicitor General does not press this point), that Congress' law is therefore content-neutral. See Biden Brief at 11-16; Cuomo Brief at 4-5. Nor does it follow that the Act may therefore be sustained on a lenient standard of review. For predicating punishment on the predicted reaction of an audience to the content of a message is just one of the many ways that a law can be content-based. It is not the only one. It is not even a central one. A law can be equally and more obviously content-based if, without reference to audience reaction, it either explicitly restricts speech by reference to its message, or finds its sole justification in interests related to the suppression of expression. The Flag Protection Act falls under both descriptions.

First, the language of the Flag Protection Act, even without a "seriously offend" clause, explicitly disadvantages selected viewpoints. Even assuming that a law that was genuinely designed to protect the physical integrity of the flag in all circumstances would be valid,⁵ the Flag

⁵ The Court has never held as much, but occasional dicta in opinions suggest this possibility. See, e.g., *Johnson*, 109 U.S. at 2543; *Smith v. Goguen*, 415 U.S. at 591 (Blackmun, J., dissenting). The suggestion, however, is mysterious. For protecting a flag from physical destruction in all circumstances protects not a thing -- the flag is not a discrete material entity -- but rather protects an idea embodied in symbolic form. Just as a constitution is a locus of ideas embodied in words and instantiated in physical entities when those words are printed upon a page, so too the symbolism of the flag is physically instantiated in material flag-like objects. The same holds true for the National Anthem and likenesses of George Washington or George Bush. Thus, even a statute that did protect flags in all circumstances would not be at all like a statute protecting the physical integrity of the

(continued...)

Protection Act is not such a law. Rather, like earlier federal statutes proscribing "contemptuous" treatment of the flag, and like Texas' proscription of "offensive" treatment of the flag, the Flag Protection Act surrounds its proscription of flag-burning with a list of expressively charged acts. "Mutilation," "defacement," "defilement," and "trampling," for instance, all connote hostile treatment of the flag. Far from protecting the physical integrity of the flag in all circumstances, these terms protect the flag only from those who would hurt it or cast it in bad light -- exactly the content-based approach rejected in *Johnson*. Furthermore, §700(a)(2)'s explicit exemption for cremation of "worn or soiled" flags -- a mode of flag-burning traditionally associated with the highest patriotic respect -- only underscores the viewpoint discrimination also inherent in the statute.

It is no answer to assert that, notwithstanding its charged language, the Flag Protection Act will be applied across the board to all physical violations of the flag whatsoever, for that is obviously as a practical matter impossible. No rational prosecutor will proceed, for example, against the child who crumples up a flag-emblazoned paper cup at a Fourth of July picnic.⁶ But the very degree of discretion thus lodged in enforcement officials only underscores the inescapable content-based suppression of ideas underlying the Act. It is workable only if limited to those at whom it was "really" ad-

⁵ (...continued)

President in all circumstances. Rather such a law would be analogous to a statute protecting the physical integrity of *representations* of the President in all circumstances -- an analogy that demonstrates such a law's constitutional deficiency.

⁶ This example was put by William P. Barr, Assistant Attorney General of the United States, Office of Legal Counsel, in his statement to the Committee on the Judiciary of the United States Senate, Hearings at 88.

dressed.

Even if the language in the Act or its likely pattern of enforcement could boldly be characterized as viewpoint-neutral, however, there is a second and more fundamental reason why the Act is nonetheless viewpoint and content-based nonetheless. The reason is that protecting the flag qua flag aims irreducibly at the suppression of expression. The only purpose available to justify such a law, or indeed advanced in this case, is the protection of a symbol -- as the Solicitor General puts it, the "unique symbol of our Nation." SG Brief at 29; see Biden Brief at 19-21. Protecting the flag as a symbol against symbolic attack has no instrumental purpose beyond the suppression of an offensive expression. It is not a means to any other end. Rather, it is the consecration of a symbol for its own sake; a ban on those who commit blasphemy against that symbol. And protection of a symbol is necessarily "related to the suppression of expression." 109 S.Ct. at 2542. For protecting something as a symbol has no meaning other than protecting a form of expression, here political expression, from symbolic contradiction or symbolic appropriation to the flag-burners' own political opinion.

This Court held as much in *Johnson*. There, the Court switched the case onto the track of strict scrutiny because it found the only state interest implicated in the case -- "preserving the flag as a symbol of nationhood and national unity," 109 S.Ct. at 2542 -- to be necessarily related to the communication of ideas. "The State, apparently, is concerned that [flag-burning] will lead people to believe either that the flag does not stand for nationhood and national unity, but instead reflects other, less positive concepts, or that the concepts reflected in the flag do not in fact exist, that is, we do not enjoy unity as a nation. These concerns blossom only when a person's treatment of the flag communicates some message, and thus are related 'to the suppression of free

expression'. . . ." *Id.* The same is true here, where again the only interest implicated or asserted is the protection of the symbolic value of the flag.

For these reasons, the standard of review set forth in *United States v. O'Brien*, 391 U.S. 367, for laws "unrelated to the suppression of expression" is inapposite here. So is the deferential standard of review applicable to "time, place, or manner" restrictions on expression in public forums. See, e.g., *Ward v. Rock Against Racism*, 491 U.S. ___, 109 S.Ct. 2746 (1989). In ignoring the force of *Johnson* and urging application of such standards here, amici on the government's side, notably Senator Biden, make a fundamental mistake. See Biden Brief at 8-9, 13-16, 23-24 n.8.

That mistake is to confuse anti-flag-burning laws with laws that serve some function unconnected with ideas. Of course laws against "[v]andalism, terrorism, or public nudity" are valid notwithstanding any incidental effect they might have upon vandals, terrorists, or latter-day Lady Godivas with a political message. See Biden Brief at 8, 24 n.8. The same is true of laws that forbid brothels, the Court has held, whether situated in bookstores or bakeries, see *Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986), or speeding laws even when applied to the anchor of the evening news en route to work, see *id.* at 708 (O'Connor, J., concurring). Similarly, it was crucial to upholding the conviction in *O'Brien* that the government relied, in Professor Ely's words, on "interests, having mainly to do with the preservation of selective service records, that would have been equally threatened had O'Brien's destruction of his draft card totally lacked communicative significance -- had he, for example, used it to start a campfire for a solitary cookout or dropped it in the garbage disposal for a lark." Ely, "Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis," 88 Harv.L.Rev. 1482, 1498 (1975). Like all of these

content-neutral laws, "manner" restrictions -- such as bans on camping overnight at the capital's most frequented public parks, see *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984) -- likewise turn on harms that can be understood and proscribed without any reference to expression. But the Flag Protection Act is fundamentally different from all such laws.

Unlike draft cards, whose maintenance in the possession of potential draftees was deemed in *O'Brien* to ensure efficient conscription in times of national security emergency, or Social Security numbers, whose attribution to individuals facilitates the administration of the government welfare system, see *Bowen v. Roy*, 476 U.S. 693, the private possession of flags serves no function for the government unrelated to expression. And in contrast to bans on vandalism, terrorism, or public nudity, anti-flag-burning laws stand or fall on their protection of a symbol. Stripped of the rationale of protecting the symbolic value of the flag, no rationale remains for a flag-burning prohibition. Stripped of the mantle of political protest in which Lady Godiva cloaked her public nudity, the prohibition of nudity remains.⁷

⁷ Defenders of the Flag Protection Act have also tried to analogize it to protection of gravesites or bald eagles. See Biden Brief at 14-15; Testimony of Laurence H. Tribe before the Senate Judiciary Committee, Hearings at 151-52; Stone, Flag-Burning and the Constitution, 75 Iowa L.Rev. 111, 120-21 (1989). But these examples, like Lady Godiva, miss the point. The deficiency of the Flag Protection Act is not that it protects a symbol, but that it protects *only* a symbol. Bald eagles, like spotted owls or United States Presidents, are animate objects and their protection has something irreducible to do with the sanctity of life. Gravesites are resting places for the dead, and so are at least connected with respect for human life; they are also frequently connected with religious sensibilities that have traditionally received special protection under the Free Exercise Clause. But the flag is not animate; it is a symbol only. And a free democratic society can tolerate no code of *civil* blasphemy. Accordingly, the analogy to bald eagles and to gravesites is inapt.

Time, place, and manner analysis would be appropriate if appellees were before this Court for violating laws prohibiting the setting of fires in public streets or places. But, of course, the statutory language the Court considers here is not of that sort at all. It does not prohibit burning a copy of the United States Constitution or yesterday's newspaper in public, but may prohibit crumpling up and tossing in a wastebasket a paper representation of the flag. Appellees no more violated an anti-fire ordinance than Mr. Goguen violated a sewing code.

Try as they may, then, the Solicitor General and his *amici* cannot avoid explaining this statute as a protection of the flag as a symbol -- and nothing else. Accordingly, it is both viewpoint and content-based. Thus, the appropriate standard of review is the most exacting one. In sum, the Flag Protection Act is invalid unless it advances closely some compelling interest other than the suppression of expression.

III. NO COMPELLING GOVERNMENT INTEREST UNRELATED TO THE SUPPRESSION OF EXPRESSION CAN JUSTIFY THE FLAG PROTECTION ACT'S INFRINGEMENT OF FREEDOM OF SPEECH

Because the Flag Protection Act encompasses high-value political speech within its prohibitions, and does so in a way that is explicitly or irreducibly viewpoint and content-based, the appropriate standard of review is the one employed to invalidate the convictions in *Johnson*: the "most exacting scrutiny." 109 S.Ct. at 2543. Under that standard, the statute must fall, for it advances closely no compelling interest unrelated to the suppression of expression. But even if the more lenient standard of *O'Brien* were applied, the statute would still be invalid, for its restriction of First Amendment freedoms is unnecessary to the furtherance of any plausible government

interest.

A. The Act Fails Strict Scrutiny

A content-based statute is invalid unless the government can demonstrate that it is "necessary to serve a compelling state interest and . . . is narrowly drawn to achieve that end." *Boos v. Barry*, 485 U.S. at 321; *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 231 (1987). Here that exacting test cannot be satisfied.⁸

Neither the Solicitor General nor his *amici* assert any end other than preservation of the flag as a symbol to defend the Flag Protection Act.⁹ Nor could they. For this is not a case about protection of government property. Of course the government may protect the Washington Monument from defacement, even by the most political of graffiti, "[f]or there a governmental interest quite obviously unrelated to the suppression of expression is implicated, namely the cost and trouble of sandblasting." Ely, "Flag Desecration," 88 Harv.L.Rev. at 1504. Likewise for rebuilding costs if the weapon is the blow torch rather than the spray gun. Nor is this a case about protection of another's private property from theft or destruction; this case presents squarely the issue only of burning a flag of one's own. And plainly no bar on incitement to riot is implicated here. While the state may have a compelling interest in suppressing words or symbols -- even on the basis of their content -- when used as the literal triggers of violence, this Court has long since rejected vague and generalized predictions of such con-

⁸ The Court has appropriately treated viewpoint-based statutes with even greater skepticism. Indeed, this Court has never upheld a viewpoint-based statute against First Amendment challenge.

⁹ As noted earlier, the use of the flag as an "incident of sovereignty" is indistinguishable from its use as a political symbol, notwithstanding the contrary assertion by the House leadership. See p.4, *supra*.

sequences as inadequate. Rather, the Court has required a highly particularized showing before incitement may be suppressed. The state must prove that speech "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). Texas fell far short of such a showing in *Johnson*. See 109 S.Ct. at 2541-42.¹⁰ No doubt discouraged by Texas' example, the government from no quarter even attempts a breach-of-peace rationale in the cases before the Court here.

What government interest remains to be counted? One and only one: the "government's affirmation of national values" through preservation of the flag as "symbol of all that this Nation stands for." Biden Brief at 14, quoting Justice (then Judge) Scalia in *Block v. Meese*, 793 F.2d 1303, 1314 (D.C.Cir. 1986), quoting L. Tribe, *American Constitutional Law* 588, 590 (1st ed. 1978); Biden Brief at 19. Because that interest is related to the suppression of expression, as argued above in Point II, it is doubtful whether it may come into play as a justification at all. But even if the legitimacy of that interest is conceded, it cannot be found either compelling or closely met.

The government in effect argues that it has a compelling interest in keeping the message it beams out through the flag free of static, interruption, or interference -- like keeping a private speaker free from a heckler's veto. But even if the interest in government speech were as weighty as that of a private speaker, it is capacious to claim that banning flag-burning is essential to preserving it, or as Senator Biden puts it, that permitting

¹⁰ As the Court stated: "To accept Texas' arguments that it need only demonstrate 'the potential for a breach of the peace,' . . . and that every flag-burning necessarily possesses that potential, would be to eviscerate our holding in *Brandenburg*. This we decline to do." 109 S.Ct. at 2542.

flag-burning will reduce government to "a philosophical cipher, standing for absolutely nothing." Biden Brief at 14. This case is not about limits on government speech. There is no issue here about the government's own display or treatment of the flag, nor about efforts to promote voluntary respect for the flag or particular conceptions of patriotism. At issue here is a criminal proscription of an offending and disfavored expression by private persons. And this Court has a long tradition of First Amendment protection against government's compulsory promotion of its messages through its citizens' mouths or property.

Two examples should suffice. *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943), declared that people cannot be compelled to affirm their patriotism by saluting the flag. And *Wooley v. Maynard*, 430 U.S. 705 (1977), held that the First Amendment precluded the state of New Hampshire from punishing criminally those who willfully obscured the state motto "Live Free or Die" on license plates issued by the state as a condition of the privilege of driving on the state's highways.

It is no answer to say that here, unlike *Barnette*, the government compels symbolic silence rather than speech. For *Wooley* clearly established that compulsion may no more be used to silence private expression that would block or obscure the government's attempted broadcast of its own favored message than it may be used to secure affirmation of a particular government-ordained view. As Professor Ely puts it, "Orthodoxy of thought can be fostered not simply by placing unusual restrictions on 'deviant' expression but also by granting unusual protection to expression that is officially acceptable." Ely, "Flag Desecration," 88 Harv.L.Rev. at 1507.

Thus on the appropriate test, that of strict scrutiny, the Flag Protection Act must fall.

B. The Act Fails The *O'Brien* Test

Even if the Court were to accept the characterization of the Flag Protection Act as content-neutral -- a characterization that would be extraordinary, as argued above -- it should strike it down nonetheless on the *O'Brien* standard. For even if the interest in preserving the flag as a symbol of national unity were deemed substantial and unrelated to ideas (a seeming contradiction in terms), the Act would fail the third hurdle *O'Brien* poses: that "the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." 391 U.S. at 377. The *only* way that the government could maintain all draft cards intact in the possession of their recipients was to bar their destruction; the justification accepted in *O'Brien* thus rested on a virtual tautology. But there is no similarly close fit here. Flag-burning does not undermine the government's symbolism as draft-card-burning undermines the draft; to the contrary, people choose to burn the flag to express dissent precisely because it is such a powerful symbol. Moreover, because a flag is not a thing but rather a symbol, destruction of what the government would protect is conceptually impossible; the burning of one of more physical instantiations of the flag's symbolism cannot obliterate its symbolic value.

Thus here, unlike the case in *O'Brien*, the law is not narrowly tailored to its purported goals. Yet even with respect to laws deemed content-neutral, the First Amendment demands more than a metaphorical connection between means and end. On even the more lenient *O'Brien* test, therefore, the Flag Protection Act must fall.

CONCLUSION

For the reasons stated herein, the decisions below should be affirmed.

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Dated: May 2, 1990

MAY 3 1990

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CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

UNITED STATES OF AMERICA,
v. *Appellant*

SHAWN D. EICHMAN, *et al.*,
Appellees

UNITED STATES OF AMERICA,
v. *Appellant*

MARK JOHN HAGGERTY, *et al.*,
Appellees

On Appeals from the United States District Courts
for the District of Columbia and the
Western District of Washington

**BRIEF OF THE AMERICAN BAR ASSOCIATION
AS AMICUS CURIAE IN SUPPORT OF APPELLEES**

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**BRIEF OF THE AMERICAN BAR ASSOCIATION
AS AMICUS CURIAE IN SUPPORT OF APPELLEES**

With consent of the parties, the American Bar Association (the "Association") respectfully submits this brief as *amicus curiae* in support of the decisions of the two district courts below.

INTEREST OF AMICUS CURIAE

The First Amendment issues involved in these two joined cases have long been of interest to the Association.

Fifty years ago, briefs as *amicus curiae* were filed on behalf of the Association by its Special Committee on the Bill of Rights in *Minersville School District v. Gobitis*, 310 U.S. 586 (1940), and later in *Board of Education v. Barnette*, 319 U.S. 624 (1943). In both instances, the Association took the position upheld by the Court in *Barnette* in its overruling of *Gobitis*.

More recently, at its annual meeting in August 1989, the Association's House of Delegates adopted three resolutions presented by its Task Force on the First Amendment, which had been appointed to investigate and evaluate the various proposals designed to overcome or avoid, either by constitutional amendment or federal legislation, the holding of this Court last Term in *Texas v. Johnson*, — U.S. —, 109 S. Ct. 2533 (1989).¹ The Association resolved that it

(1) opposed, in the interest of the right to freedom of speech and expression under the First Amendment, the adoption of a constitutional amendment authorizing criminalization of desecration of the American flag as a political protest;

(2) opposed, both on the merits and because of doubtful constitutionality, federal legislation that would seek to criminalize the desecration of the American flag as a political protest; and

(3) deplored any desecration of the flag and declared its full support for the proposition that the flag is a revered national symbol that ought to be treated with great respect by all citizens of the United States.²

¹ The resolutions are included in the Appendix hereto.

² The resolutions were submitted to the Congress by the Chair of the House of Delegates by letter of August 21, 1989 from George E. Bushnell, Jr. to Rep. Don Edwards. See Appendix. See also *Statutory and Constitutional Responses to the Supreme Court Decision in Texas v. Johnson: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 101st Cong., 1st Sess. 393-94 (1989)*.

The interest of the Association in filing this brief as *amicus curiae* is the preservation of First Amendment rights of political dissenters.³ As members of the legal profession, we have a special interest in protecting individual rights and liberties under the First Amendment and the maintenance of principles which often run counter to majoritarian views. We also have a special obligation to ensure that statutes which limit such rights are scrutinized carefully, and pursuant to established constitutional principles, notwithstanding the popular support for such enactments.

THE ASSOCIATION'S POSITION

The United States flag is a symbol of sovereignty, as is typical of all national flags. What is unique to our flag is its symbolism to many throughout the world of the freedoms guaranteed by the Bill of Rights. Sovereignty and freedom of speech are compatible. Reason and experience demonstrate that the inevitable consequence of enforcement of the Flag Protection Act of 1989 will be the prosecution of those, like the appellees in the present cases, who use the flag in offensive ways to express political dissent. The First Amendment right of free speech and expression is at issue. Principles declared by the Court in cases from *Board of Education v. Barnette*, 319 U.S. 624 (1943), to *Texas v. Johnson*, — U.S. —, 109 S. Ct. 2533 (1989), control the result here. Since flag burning is a familiar form of political dissent everywhere, the Court's decision will have

³ The Association is also interested in showing that its present position on punishment for flag abuse is reflected by the recent action of its House of Delegates in 1989 in adopting the resolutions of its Task Force on the First Amendment rather than by its approval in 1918 of a "Uniform Law for the Protection of the Flag of the United States," reported in the Senate Brief at 15. See *infra* note 27. The Association's later action did not refer to the earlier position but was clearly an implicit rejection of it.

worldwide importance for both friends of democracy and supporters of dictatorship.

ARGUMENT

The American flag is a complex symbol. It represents the state's legitimate power and authority derived from the people, as well as the inalienable right of the people to remain free from the arbitrary exercise and imposition of such delegated power and authority. This dual symbolism is reciprocal and self-reinforcing. Accordingly, the flag's value as a symbol of power and authority cannot be protected at the expense of its value as a symbol of freedom.

When applied to punish those who damage an American flag as a peaceful expression of political dissent, the Flag Protection Act of 1989 violates the constitutional prohibition against laws abridging the freedom of speech.⁴ Congress drafted the statute to appear "content neutral" in the hope that such an appearance of neutrality would insulate the law from successful constitutional challenge, but reason and experience, confirmed by legislative history, demonstrate that Congress' sole interest was to protect the symbolic meaning of the flag—clearly a speech-related interest under *United States v. O'Brien*, 391 U.S. 367 (1968)—and that in actual application the law would, as in these cases, criminalize conduct that conveys some message challenging the majority's view of the values represented by the flag.

Nothing in this Court's prior decisions requires it to ignore the speech-related interests underlying this statute, its inevitable effect, and its purpose. Indeed, prece-

⁴ One of the two cases before the Court, *United States v. Haggerty*, No. 89-1434, involved the burning of a publicly-owned flag, but the separate count charging the defendants with "willfully injuring property of the United States" is not before the Court on this appeal. We are not here seeking to defend the destruction of a flag belonging to the United States or to any other person.

dent dictates that a statute such as the Flag Protection Act of 1989, which was designed to serve, and will serve, little purpose other than to protect a particular symbolic meaning attributed to the flag and to punish expressive conduct that challenges such meaning, is subject to the strictest scrutiny and must fail under the First Amendment.

I. THE SYMBOLISM OF THE UNITED STATES FLAG IS NOT THREATENED BY PROTECTING EXPRESSIVE CONDUCT THAT PHYSICALLY ABUSES THE FLAG.

Both courts below and all parties here recognize the symbolism of the United States flag.⁵ As a symbol of United States sovereignty, unity and patriotism, the flag has no challenger. It is also recognized by nearly all parties and the courts below as an important symbol of the freedoms found in the Bill of Rights, including the right of free speech.⁶ As viewed by the Association, the supporters of the statute now before the Court believe that there is a direct and unavoidable tension between

⁵ *United States v. Haggerty*, No. 89-1434, Jurisdictional Statement ("J.S.") at App. 16a ("a symbol of freedom in this nation"); *United States v. Eichman*, No. 89-1433, J.S. at App. 17a ("this solemn symbol of our Nation's soul"); Brief for the United States at 34, 44, 45 ("the unique symbol of the Nation"), and at 36 ("the Nation's unique symbol of community"); Brief for the Speaker and Leadership Group of the U.S. House of Representatives, *Amici Curiae* ("House Brief") at 10, 39 (recognizing flag's "symbolic interest"); Brief of the United States Senate as *Amicus Curiae* in Support of Appellant ("Senate Brief") at 6 ("the nation's salient symbol").

⁶ See also Senate Brief at 7 ("the emblem of freedom and equality") (quoting H.R. Rep. No. 2128, 51st Cong., 1st Sess. 1 (1890)), at 31 ("a special emblem of our principles and ideals, and of our Nation's struggle for freedom") (quoting remarks of Senator William S. Cohen, 135 Cong. Rec. S12582 (daily ed. Oct. 4, 1989)), and at 32 ("a potent symbol of the right of the people to petition peacefully for the redress of grievances"). The House Brief curiously ignores this aspect of the flag's symbolism.

these two symbolisms, of authority and patriotism against free speech and expression. The Association believes that the two can and must co-exist, and that settled First Amendment principles so establish.

That the United States flag is symbolic of the nation's sovereignty and military strength and all that those terms connote is not unique in the history of flags.⁷ Millions thrill to the sight of the United States flag at parades and on other ceremonial occasions. No one can question the importance of the United States flag in the minds and hearts of our people. Moreover, we share the feelings of patriotic Americans who take great offense that some fortunate enough to live under this flag would resort to desecrating it to make a point. It is important for us to recognize, however, that as a symbol of sovereignty and patriotism, our flag, no matter that we feel strongly about it, is not unique.

Nonetheless, among flags of the world's nations, the United States flag is special in that, for both our citizens and many people beyond our Nation's borders, it symbolizes both national authority and individual freedoms.⁸

⁷ The universality of flags and their significance are described by George Henry Preble in his classic work *The Origin and History of the American Flag* (1917) at 3:

Symbols and colors enabling nations to distinguish themselves from each other have from the most remote periods exercised a powerful influence upon mankind. Thus these symbols, which during peaceful times were but trivial ornaments, became in political or religious disturbances a lever like that of Archimedes, and convulsed the world.

⁸ The report by the ABA Task Force on the First Amendment accompanying the proposed resolutions stated it thusly: "All through human history, tyrannies have tried to enforce obedience by prohibiting disrespect for the symbols of their power. The swastika is only one example of many in recent history. The American flag commands respect and love because of our country's adherence to its values and its promise of freedom, not because of fiat and criminal law." *Statutory and Constitutional Response to the Supreme Court Decision in Texas v. Johnson: Hearings Before the Subcomm. on*

Although England has had a formal Bill of Rights since 1689⁹, and the Union Jack is recognized around the World, the British flag would not have provided clear and distinct meaning if waved by those recently protesting governmental authority in Eastern Europe, the Baltic States or the streets of China's cities.¹⁰ At its best, the United States flag has had this capacity for representing to the oppressed the concept of governmental authority associated with individual freedoms.¹¹

This case requires the Court to reaffirm that national strength, unity and patriotism are compatible with the freedom to protest against such authority, even by destroying in a peaceful manner a preeminent symbol of that authority. Indeed, while such an expressive act is extremely offensive to most of us, it is the fact that we permit such protest that gives this Nation its strength. We submit that a treasured feature of the symbolism of

Civil and Constitutional Rights of the House Comm. on the Judiciary, 101st Cong., 1st Sess. 395, 403 (1989).

⁹ "An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown." 3 *Encyclopedia Britannica* 577 (1952 ed.).

¹⁰ See W. Smith, *The Flag Book of the United States* 87 (1970):

If we are to reject false history [folklore of the United States flag], we can still find much in the true story of the flag that evokes the highest admiration. It has waved over the unparalleled progress of a nation in developing democratic political institutions, scientific and technological knowledge, education and culture, commerce and industry, and countless other advances. It has served as a beacon for millions of poor and oppressed refugees from abroad and stands as a promise that the underprivileged within the country are not forgotten. Its influence throughout the world is inestimable.

¹¹ While the flag of the United States is sometimes reviled in other parts of the world as a symbol of imperialism, yet in 1864 even Karl Marx wrote, concerning the Civil War, that "the working men of Europe felt instinctively that the star-spangled banner carried the destiny of their class." *The Flag of the United States*, *supra*, at 87.

the United States flag is that it represents both great authority and, as a part of the fabric of this spirit, great tolerance, even toward a citizen seeking to challenge that authority through the peaceful destruction of one of its best-known symbols. What we revere are the ideals which the flag symbolizes, not the object itself, for those ideals remain long after any particular flag has fallen to the ravages of time or the destructive hands of an enemy in war or a political dissenter at home.¹²

In hastening to adopt the Flag Protection Act of 1989 and in mandating accelerated consideration of any decision holding the Act unconstitutional,¹³ the Congress has

¹² We cannot find in the discussion of the House Brief on "original intent," at 20-36, or the sources referred to there, any suggestion that James Madison (who himself was a leader in the crusade against the Sedition Act of 1798 and who thereby contributed enormously to banning the crime of seditious libel from American law) or other supporters of the Bill of Rights would have equated defending our ships of war and trade on the High Seas, and protecting against treason, with suppressing a peaceful protest involving abuse of a flag in an expression of dissent from governmental action. We also differ from the House Brief, at 30-32, in the significance attributed to the arrest and punishment of John Endecott of Massachusetts for defacing the British flag of that time. It should give no comfort to the supporters of the Flag Protection Act that the colonial courts, fearing retaliation by England, prosecuted, convicted and punished Endecott. What seems more significant is that ten years later Endecott was elected Governor of Massachusetts. It is difficult to conceive that this incident was viewed by the proponents of a Bill of Rights as an example of the type of conduct that needed to be criminalized. It seems more likely that James Madison, Thomas Paine and other supporters of the Bill of Rights would, like the people of Massachusetts, have honored Endecott rather than the fearful officials who prosecuted him to please the King.

Further, we have noted only recently the tolerance accorded protesters marching past the reviewing stand at Red Square in Moscow with the "Hammer and Sickle" cut out of the Soviet flag, an expression of dissent much like that of John Endecott.

¹³ Section 3 of the Flag Protection Act of 1989, Pub. L. No. 101-131, 103 Stat. 777 (to be codified at 18 U.S.C. § 700(d)).

reflected a widely shared impatience by the people of the Nation towards those few citizens who have chosen to express their opposition to governmental policy, whether generalized or specific, by burning the flag. There is nothing surprising about this. The courts, however, provide a quieter, more philosophical and judicious atmosphere in which the ultimate values woven into our national flag can be identified, appraised, reconciled where seemingly in conflict, and preserved for the present and coming generations.

Although many instances may be cited in which the flag has been physically abused in political protests, we submit that no instance can be referred to where the ideas and ideals which the flag symbolizes were damaged by this abuse.¹⁴ Indeed, the interest in preserving the flag's character as a symbol of nationhood or sovereignty is not, as a matter of fact, at all implicated when a flag is destroyed as part of a political protest. The symbol that is sought to be protected resides not in the flag, the piece of cloth that someone burns, but in the concepts associated with the flag. When someone symbolically burns a "flag," that person is *using* the symbolism of the flag, not destroying it. Instead of undermining the symbol's

¹⁴ In the House Brief at 36 n.50, the question is raised as to how we can protest to a foreign Ambassador about abuse of the United States flag in that country's streets when the Ambassador can point to our tolerance of flag abuse in this country. We suggest that the United States' protest would not be made unless our representatives suspected that the abuse of the U.S. flag was stimulated by the other government. Certainly we would not want a government like that in Iran to mete out punishment considered appropriate by its standards to someone abusing a U.S. flag. What we should fear is that the decision sought by Appellant in this case could be pointed to as a precedent by another nation seeking to punish speech or expressive conduct offensive to the government, such as the publication of *The Satanic Verses* or the abuse of the American flag by students in Korea protesting our military presence there. Except for the severity of punishment, what is the difference?

representation of nationhood, the flag burning affirms and reinforces the declaration.

II. THE FLAG PROTECTION ACT OF 1989 MUST BE SUBJECTED TO THE STRICTEST SCRUTINY, BECAUSE THE INTERESTS PROMOTED BY THE ACT ARE ALL CLEARLY "RELATED TO THE SUPPRESSION OF SPEECH," AND THE INEVITABLE CONSEQUENCE OF THE ACT WILL BE TO RESTRICT POLITICAL PROTEST SOLELY IN THE INTEREST OF PROTECTING THE CONGRESSIONALLY PREFERRED SYMBOLISM.

A.

As set out in *United States v. O'Brien*, *supra*, 391 U.S. at 377, and reiterated last Term in *Texas v. Johnson*, *supra*, 109 S. Ct. at 2540-41, a statute that restricts expressive conduct is subject to the strictest judicial scrutiny unless it serves some governmental interest that is "unrelated to the suppression of free expression." See also *Boos v. Barry*, 485 U.S. 312, 321 (1988). The United States concedes that the appellees' flag burning constituted expressive conduct, and that the Flag Protection Act of 1989 encompasses within its prohibition such symbolic speech.¹⁵ Accordingly, the central issue presented by these appeals is whether the justification for the restrictions imposed on appellees' conduct is unconnected to expression. We submit that whether the interest asserted to justify the Act is protecting the "physical integrity of the flag,"¹⁶ the flag as "the unique symbol of the Nation,"¹⁷ or the flag as an "incident of sovereignty,"¹⁸ the interest promoted is clearly *not* "unrelated to the suppression of free expression." *O'Brien*, *supra*, 391 U.S. at 377 (emphasis in original).

¹⁵ Brief for the United States at 28.

¹⁶ Senate Brief at 6, 27, 28, 33, 34; House Brief at 8, 20.

¹⁷ Brief for the United States at 34, 44, 45.

¹⁸ House Brief at 9, 20, 39.

B.

The arguments made in defense of the Flag Protection Act abound with euphemisms, the most prominent of which in this case is "protecting the physical integrity of the flag." Strips of vari-colored bunting when sewn together have a wholeness and in this sense a "physical integrity." What an owner quietly and peacefully does to an assemblage of vari-colored bunting could be of no concern to the Congress or anyone else unless this particular fabric, because of its arrangement of colors, is associated with a special meaning which the Congress wishes to protect and preserve.¹⁹ It is the spirit of symbolism of this particular arrangement of bunting about which Congress is concerned. "Integrity" in this sense takes on a secondary meaning associated with morals and truth. (Webster's Third New International Dictionary (Unabridged) 1174 (1976).) Accordingly, a majority of the Court has never held, or suggested, that a statute limited to protecting "the physical integrity of the flag" would be unrelated to expression.²⁰

The phrase "physical integrity of the flag" first appears in *Smith v. Goguen*, 415 U.S. 566, 580 (1974), where the Court held that Massachusetts' prohibition against treating the flag "contemptuously" was void for vagueness. In overturning Goguen's conviction under this provision for wearing a small cloth version of the flag sewn to the seat of his trousers, the Court found no sup-

¹⁹ In discussing the meaning of the flag, The Boy Scout Handbook refers to patriots from Washington to Martin Luther King, Jr. Boy Scouts of America, *The Official Boy Scout Handbook* 470 (1990). It is to be noted that Dr. King participated in a rally in New York City on April 15, 1967, in protest of the United States' action in Vietnam. The burning of the American flag was a part of the demonstration. N.Y. Times, April 16, 1967, at 1, col. 4.

²⁰ "A symbol by definition has no value apart from expressive value." *Measures to Protect the Physical Integrity of the American Flag: Hearings Before the Senate Comm. on the Judiciary*, 101st Cong., 1st Sess. 231 (1989) (statement of Charles J. Cooper, Esq.).

port for the state's argument that the statute reached only acts that "actually impinge upon the physical integrity of the flag." *Id.* (quoting Brief for Appellant). Although Justice White did not agree that the contempt provision was unconstitutionally vague as applied to Goguen, he concurred in the judgment on the ground that the conviction was necessarily tied to the communication of distasteful ideas about the flag and thus violated the First Amendment. Justice Blackmun in dissent found that the Massachusetts courts had "limited the scope of the statute to protecting the physical integrity of the flag," *id.* at 591, and therefore, that the provision did not violate the First Amendment *as applied to Goguen's nonexpressive conduct*.²¹ Justice Rehnquist went further in his dissent, finding "at least marginal elements of 'symbolic speech' in Goguen's conduct," *id.* at 593, but concluding that "the governmental interest [in preserving the physical integrity of the flag] is sufficient to outweigh whatever collateral suppression of expressive conduct was involved in the actions of Goguen." *Id.* at 600.

In another flag protection case that same Term, *Spence v. Washington*, 418 U.S. 405 (1974), the majority of the Court again did not recognize protection of the physical integrity of the flag as a non-speech related interest. The Court merely held that Spence's displaying of a flag out of his apartment window, upside down and affixed with a peace symbol fashioned of removable tape, did not "significantly impair[]" any interest the "State may have in preserving the physical integrity of a privately owned flag. . . ." *Id.* at 415. Moreover, in rejecting as speech-related the state's purported interest in preserv-

²¹ The record did not indicate "whether [Goguen] was attempting to communicate anything at all [by his conduct]," *id.* at 592 (Rehnquist, J., dissenting), and Justice Blackmun repeatedly emphasized the Massachusetts Supreme Court's finding that Goguen "was not punished for speech." *Id.* at 591.

ing the flag as a symbol of the Nation, the Court noted that "no other governmental interest unrelated to expression has been advanced or can be supported on this record. . . ." *Id.* at 414 n.8.

Finally, in *Texas v. Johnson, supra*, 109 S. Ct. at 2543 & n.6, the Court noted that the Texas statute at issue was "not aimed at protecting the physical integrity of the flag in all circumstances," and cited the dissenting view of Justices Blackmun and Rehnquist in *Smith v. Goguen, supra*, that the statute at issue there had been so limited. Nowhere, however, did the Court suggest that if a flag protection statute *were* so limited, it could be constitutionally applied to prohibit expressive conduct. The Court's citation to Justice Blackmun's dissent in *Smith v. Goguen* does not support such an inference since, as noted above, Justice Blackmun's opinion in that case depended upon his conclusion that Goguen had *not* been prosecuted for expressive conduct.

These cases show that the Court has not failed to recognize that the so-called "physical integrity" interest is implicitly speech-related. The Court has also had no trouble in finding that an open attempt to preserve the symbolic value of the flag is necessarily and explicitly connected to the suppression of expression. In *Spence v. Washington, supra*, the Court found that the state's "interest in preserving the national flag as an unalloyed symbol of our country" is "directly related to expression in the context of activity like [Spence's]." 418 U.S. at 412, 414 n.8. Likewise, in *Texas v. Johnson, supra*, the Court found that "an interest in preserving the flag as a symbol of nationhood and national unity" was "related 'to the suppression of free expression' within the meaning of *O'Brien*." 109 S. Ct. at 2542. Such an interest in preserving the flag as "a symbol with a determinate range of meanings" cannot survive strict scrutiny. *Id.* at 2544.

C.

The Flag Protection Act of 1989 is nothing more than an effort to protect particular symbolic meanings of the flag. It is only when the flag is handled in certain ways that show disrespect that the Act comes into play. Proscribed by the Act are those things which political dissenters have often done, such as defacing, trampling upon, defiling or burning the flag, to dramatize ideas that clash with the ideas about the flag which Congress would approve. Congress has sought in the Act to preserve and protect the set of ideas that its members and most of our citizens associate with the flag by drafting a statute apparently "neutral on its face" which, despite the holding by this Court in *Texas v. Johnson*, *supra*, Congress thought would withstand constitutional attack against criminalization of the abuse of flags in political protests.

This was an ill-conceived effort, as was made clear by the Government's own legal advisor in his written submission to the House of Representatives in connection with its consideration of flag protection legislation:

It has been argued that the Court would uphold a statute if it prohibited *all* Flag desecration, whether in public or private, and whether done with contempt or not. This argument is demonstrably wrong because it assumes that the Government's reason for enacting a facially neutral prohibition (that is, a statute neutral as to the *particular* viewpoint expressed) would be "unrelated to expression." It would not be. The Government's reason for passing a viewpoint-neutral prohibition would be the same as its reason for passing a prohibition on contemptuous desecration only: protection of the symbolic value of the Flag. The Supreme Court has held in two successive cases, *Spence v. Washington* and *Texas v. Johnson*, that it is the Government's *reason* for the prohibition, not the scope of the prohibition, that determines the level of scrutiny. Because the Gov-

ernment's reason for protecting the Flag is necessarily related to expression, the prohibition would always be subjected to exacting scrutiny, and therefore would never prevail over an individual's First Amendment interest in expressive conduct.²²

Certainly, a content neutral statute *may* be constitutional, *if* it serves "an important and substantial interest" and its impingement on free speech is only incidental, *United States v. O'Brien*, *supra*, 391 U.S. at 377; or if it is applied only to nonexpressive conduct. *Smith v. Goguen*, *supra*, 415 U.S. at 590-91 (Blackmun, J., dissenting). If, however, the interest sought to be promoted by the legislation is directly related to the suppression of expression, and its principal impact will be on expressive conduct that is protected by the First Amendment, then it does not matter that the statute applies to nonexpressive conduct as well.

The communicative elements of the United States flag are so dominant that the restrictions placed by the Flag Protection Act on physical abuse of the flag are necessarily restrictions on expression. The United States flag speaks eloquently, but a disrespectful response by a dissenting citizen would be muted by the Act, which compels a person to act, if at all, in a way that endorses the majority view of the flag. For one who disagrees with the majority view, this amounts to a compulsion "to utter what is not in his mind," *Board of Education v. Barnette*, *supra*, 391 U.S. at 634, or else to remain silent. Thus, it is the inevitable consequence of the Act that the principal offenders to be prosecuted, perhaps the sole offenders, will be political dissenters similar to the defendants in the cases before the Court. This is inherent in

²² *Statutory and Constitutional Responses to the Supreme Court Decision in Texas v. Johnson: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 101st Cong., 1st Sess. 179-80 (1989) (emphasis in original) (statement of William P. Barr, Assistant Attorney General, Office of Legal Counsel).

the statute itself and, as discussed below, is shown by the Act's legislative history to have been the sole purpose and intent of the Congress.

D.

An examination of the legislative history of the Flag Protection Act of 1989 confirms that the inevitable consequences of the Act are fully consistent with the purpose and intent of Congress in enacting the legislation. Criminalization of nonexpressive abuse of the flag was, at most, only peripheral and incidental to Congress' principal aim to punish protestors who offend others by dramatic abuse of the flag in order to attract attention to the political views they expound.

It was openly and repeatedly stated by Members of Congress and reflected in the Congressional committee reports that the purpose and motivation for the Act was to design a statute which would avoid the rule of *Texas v. Johnson*, the result of which would be to permit the prosecution of those who abuse the flag in expressing political dissent. No other motivating cause can be found in the Act's voluminous legislative history. Certainly the avoidance of the rule of *Texas v. Johnson* would not have been necessary to reach nonexpressive flag abuse. Nowhere in the Committee reports, the statements on the floors of the House and Senate, or the oral and written statements of members of the Congress and others presented at the Committee Hearings, have we found any anecdotal or empirical evidence of actual nonexpressive flag abuse. Of course, one might give hypothetical examples of such abuse, as when a careless or insensitive person allows a flag to drag on the ground or uses a flag to wash a car, but this hardly justifies criminalization or explains the great emotion shown over the present statute or the high priority attributed to it by the Congress.

Thus, the sole objective of the legislation was to permit the prosecution of those who were shielded by *Texas v. Johnson* in their abuse of the American flag as an ex-

pression of political protest or dissent. Congress adopted the approach of broadening the coverage of the statute in order to validate the same kind of prosecutions which it assumed could not be upheld under the 1968 flag protection act. The entire exercise was to change some words in a way that signified nothing of real significance in an attempt to get around the First Amendment barrier identified by the Court in *Texas v. Johnson*.

Reason and experience tell us that punishment of political dissenters would be the dominant function of the Act if it were upheld, and that application of the Act to nonpolitical abuses of the flag arising from carelessness or insensitivity would be not only incidental but almost nonexistent. As clearly confirmed by the legislative history, punishment of nonexpressive abuse was not an interest that Congress sought to promote, and its authorization of such punishment served the sole function of providing a device for the argument that the Act, because of its extension to nonexpressive abuse, became "neutral on its face" and beyond constitutional challenge. We submit that for the Court to accept such a subterfuge would make a mockery of reason and experience, create a dangerous precedent for restriction of the Bill of Rights, and seriously weaken the guarantees of the First Amendment.

III. THE RECOGNIZED AUTHORITY OF THE CONGRESS TO MAKE LEGISLATIVE FINDINGS AND SET GOVERNMENTAL POLICY DOES NOT DIMINISH THE CONSTITUTIONAL ROLE OF THE FEDERAL JUDICIARY TO UPHOLD FIRST AMENDMENT RIGHTS.

The United States is commendably candid in acknowledging that its position is "in tension" with *Texas v. Johnson*, *supra*, and urges the Court to reconsider and appropriately limit *Johnson*. The United States argues that the Court should defer to the "Congressional determination regarding the need to protect the physical integrity of the American flag that led to enactment of the

Flag Protection Act.”²³ Such deference, however, would entrust to Congress the value balancing that the courts have traditionally performed in exercising strict scrutiny in First Amendment cases. This argument, therefore, deserves special comment because, in the Association’s view, it threatens the institutional role of the federal judiciary and, indeed, the presuppositions of *Marbury v. Madison*, 5 U.S. 137 (1803), itself.

The United States recognizes that “[d]eference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake.”²⁴ The decision of this Court from which this language is taken involved a state legislature’s express finding “that a clear and present danger to the orderly administration of justice would be created by divulgence of the confidential proceedings” of a Judicial Inquiry Commission. *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843 (1978). The Court responded as follows:

A legislature appropriately inquires into and may declare the reasons impelling legislative action but the judicial function commands analysis of whether the specific conduct charged falls within the reach of the statute and if so whether the legislation is consonant with the Constitution. *Were it otherwise, the scope of the freedom of speech and of the press would be subject to legislative definition and the function of the First Amendment as a check on legislative power would be nullified.*

Id. at 844 (emphasis added).

The United States’ argument in these appeals for this Court’s deference to Congressional value judgments regarding flag burning risks precisely the kind of nullification of the function of the First Amendment and the

²³ Brief for the United States at 42 (emphasis in original).

²⁴ Brief for the United States at 26 (quoting *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843 (1978)).

role of the judiciary that this Court rejected in *Landmark*. The United States supports its argument for such a radical restructuring of our constitutional safeguards by quoting a passage from *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981), suggesting that the “customary deference accorded the judgments of Congress” is particularly “appropriate when . . . Congress specifically considered the question of the Act’s constitutionality.”²⁵ However, when *Rostker* and *Landmark* are read appropriately in the context of the two cases and in light of the very different concerns being addressed by the legislature in each case, it becomes clear that *Rostker* in no way undermined or limited *Landmark*.

At stake in *Rostker* was whether the Congressional decision to limit registration under the Military Selective Service Act to males constituted sex discrimination. The Congressional judgment to which then Justice Rehnquist urged deference was the determination, after hearing extensive testimony, that the possibility of using 80,000 females in noncombat positions did not make it worthwhile to incur the added burdens of including women in draft registration plans. The Congressional determination to which deference was given in *Rostker*, therefore, was a determination of primary facts as to which Congress’ fact-gathering capacities uniquely extended. It was *not* a Congressional effort to gauge the weight of allegedly compelling interests or the seriousness of possible First Amendment infringements and to weigh these in the strict scrutiny balance—a task that in our constitutional system has always been a function of the judiciary. In short, deference to legislative assessments of constitutional values is the very legislative role rejected by the Court in *Landmark*, and the asserted Congressional weighing of competing values for which the United States seeks deference in this case fits the value-

²⁵ Brief for the United States at 26-27.

balancing *Landmark* model, not the very different, primarily fact-assessing model of *Rostker*.

To hold that the Flag Protection Act of 1989 can pass the strictest scrutiny because it is justified by an interest in protecting government policies and dominant values, as determined and weighed by Congress itself, would be tantamount to reintroducing the seditious libel concept into American law. One of the deepest strands in our First Amendment law is the impermissibility of that crime under our Constitution. That is the lesson the Court drew from the controversy over the Sedition Act of 1798, which, according to the Court, "first crystallized a national awareness of the central meaning of the First Amendment." *New York Times Co. v. Sullivan*, 376 U.S. 254, 273 (1964). The *New York Times* case is as important as it is precisely because it makes clear that "seditious libel"—criticism of government and dominant values—is protected by the First Amendment.²⁶ To uphold now a ban on flag burning because of the Congressionally perceived interest in protecting the government's or the majority's values against dissenting voices, *i.e.*, to equate the flag with an essentially partisan view of the values with which it is to be identified, risks an intolerable erosion of our freedoms.

IV. INVALIDATION OF THE ACT AS APPLIED TO EXPRESSIVE POLITICAL DISSENT IS COMPELLED BY A LOGICAL PROJECTION OF PRIOR DECISION OF THE COURT.

Over the past twenty-one years the Court has accepted jurisdiction and acted upon four flag abuse cases—*Texas v. Johnson*, *supra*; *Spence v. Washington*, *supra*; *Smith v. Goguen*, *supra*; and *Street v. New York*, 394 U.S. 576 (1969). We submit that the developing doctrine set forth in these cases, in *Board of Education v. Barnette*, *supra*,

²⁶ See Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 Sup. Ct. Rev. 191.

in *United States v. O'Brien*, *supra*, and in other related decisions of the Court²⁷ requires an affirmative answer to the question now directly at issue: Is an act of Congress that on its face identifies and criminalizes familiar forms of expressive flag abuse, without reference to the public nature of the event, the motives of the accused or the reaction of others, unconstitutional when applied to peaceful expressive conduct undertaken publicly by a political protester. For the first time, the Court is squarely faced by a flag protection act of the United States which is presented by its defenders as being "content neutral" but which reason and experience, supported by an ample legislative history, demonstrate will have the inevitable consequence of punishing political dissenters, like the appellees in the cases before the Court, who abuse the flag to dramatize their opinions and beliefs.

In the earliest of the Court's four flag abuse cases, *Street v. New York*, *supra*, Street was convicted of violating the New York flag abuse statute by burning an American flag and shouting to a small crowd, "We don't need no damn flag," and "If they let that happen to Meredith [civil rights leader James Meredith reported in the news as having been shot in Mississippi] we don't need an American flag." 394 U.S. at 579. The Court invali-

²⁷ The increasing awareness over past decades of the seriousness of the First Amendment issues involved in these flag abuse cases is well-illustrated by the contrast between the Association's action in 1989 shown in the Appendix and its earlier action in 1918, reported in the Senate Brief at 15, where the Association approved a "Uniform Law for the Protection of the Flag of the United States." That law would have criminalized not only stated forms of physical misuse of a flag, done publicly, but also casting contempt "by word or act" upon any "flag, standard, color, ensign, or shield" of the United States or of the state, or any copy, picture or representation of such. Report of the Forty-First Annual Meeting the American Bar Association at 82 (1918). The Uniform Act would clearly have failed the test of *Texas v. Johnson*.

dated the conviction on constitutional grounds since it could not be determined from the record that Street had not been convicted because of words alone or because of words and deeds. *Id.* at 590. The Court concluded that in either event the accused's rights of free speech were violated. *Id.* at 590-94. The Court expressly reserved its view on the validity of a conviction based solely upon burning of the flag conducted as an act of protest, *id.* at 594, but Justice Harlan's opinion for the Court strongly suggested that an interest in the symbolic value of the flag could not justify convicting political protesters for burning the flag:

We have no doubt that the constitutionally guaranteed "freedom to be intellectually . . . diverse or even contrary," and the "right to differ as to things that touch the heart of the existing order," encompass the freedom to express publicly one's opinions about our flag, including those opinions which are defiant or contemptuous.

394 U.S. at 593 (quoting *Board of Education v. Barnette*, *supra*, at 642).

The next of this Court's flag cases was *Smith v. Goguen*, *supra*, where the Court in reviewing a Massachusetts flag misuse statute held it unconstitutional under the Due Process Clause of the Fourteenth Amendment because the critical statutory term "treats contemptuously" was unduly vague.²⁸ Although the Court may have assumed that a legislature could define "with substantial specificity what constitutes forbidden treatment of United States flags," it carefully refrained from saying what language would be required or whether such a statute would violate First Amendment rights when applied to expressive conduct. 415 U.S. at 581-83. Justice White concurred in the result on the grounds that the words "treats contemptuously" connoted a communi-

²⁸ See discussion in Section II.B., *supra*.

cative element and since Goguen's conduct was clearly expressive of contempt for the United States, the statute violated the First and Fourteenth Amendments as applied to him. *Id.* at 583-90. Justice Blackmun was joined by Chief Justice Burger in a brief dissent. They would have accepted the conclusion of the Supreme Judicial Court of Massachusetts "that Goguen 'was not prosecuted for being 'intellectually . . . diverse' or for 'speech.' '" *Id.* at 590-91 (quoting *Street v. New York*, *supra*, 394 U.S. at 593-94). Thus, Justice Blackmun would uphold a flag misuse statute "neutral on its face," as the state court in effect held the Massachusetts statute to be, where it was applied to nonexpressive conduct, as the state court found to be the case. Under this analysis, the rights of free speech and expression under the First and Fourteenth Amendments were not implicated in *Goguen*. This, of course, contrasts with our present facts, where expressive conduct is admittedly involved.

The facts and issues before the Court in *Spence v. Washington*, *supra*, come very close to those of the present case. There, a college student attached a large peace symbol to the front and back of a privately-owned United States flag and hung it upside down from his apartment window in Seattle, Washington. He was arrested and charged with violation of a state statute which forbade the exhibition of a United States flag to which is attached or superimposed figures, symbols or other extraneous material. This so-called improper use statute was "neutral on its face" in that it required no particular intent on the part of the violator or any reaction on the part of any viewer, though it did contemplate that the placements on the flag be for "exhibition or display." 418 U.S. at 407. The actions of the student concededly constituted a form of communication and expression. The majority opinion recognized the neutrality of the Washington statute on its face, saying:

The statute's application is quite mechanical, particularly when implemented with jury instructions like the ones given in this case. The law in Washington, simply put, is that nothing may be affixed to or superimposed on a United States flag or a representation thereof.

Id. at 414 n.9. Nevertheless, despite this apparent neutrality, the Court concluded that the statute was "unconstitutional as applied to appellant's activity." *Id.* at 414.

In evaluating the significance in *Spence* and in the present cases of the state's asserted interest in preserving the national flag as an "unalloyed symbol of our country," *Spence, supra, id.* at 412, it is difficult to draw a meaningful distinction between a prohibition against destruction of a flag by burning and defacement of a flag by attaching to it removable "words, figures, marks, pictures, designs" and the like. Thus, that case and the cases presently before the Court seem inseparable on the basic issue before the Court.

In *Texas v. Johnson, supra*, the last in the series of the Court's four flag decisions, the Court recognized that "messages conveyed without use of the flag are not 'just as forceful' as those conveyed with it." 109 S. Ct. at 2546 n.11 (quoting dissenting opinion of Rehnquist, C.J., *id.* at 2553). To permit the flag to be used in ways that express the majority's respect and admiration, approaching reverence for many, but to deny to the minority the use of a flag in a way that expresses dissent, "assumes that there is only one proper view of the flag." *Id.* at 2544 n.9. It would permit the flag to express ideas "only in one direction." *Id.* at 2546. In noting that toleration of expressive flag abuse is evidence of our nation's strength, Justice Brennan referred to the memorable words of Justice Brandeis written sixty-three years ago:

To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.

Id. at 2547 (quoting *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring)).

Controlling in the present cases are the principles reflected in the Court's response to Texas' argument that Johnson's conviction under state law was justified by the State's "interest in preserving the flag as a symbol of nationhood and national unity." 109 S. Ct. at 2542. The Court noted that "[a]s in *Spence*, '[w]e are confronted with a case of prosecution of an idea through activity,'" 109 S. Ct. at 2542, and concluded that the "State's asserted interest in preserving the special symbolic character of the flag" should be subjected to "the most exacting scrutiny." *Id.* at 2543. The Court's observation that "the special role played by our flag" would not be endangered by the decision forbidding the prosecution is as fully applicable here as it was there. *Id.* at 2547. The Court added: "Our decision is a reaffirmation of the principles of freedom and inclusiveness that the flag best reflects, and of the conviction that our toleration of criticism such as Johnson's is a sign and source of our strength." *Id.*

Despite some divergence of views in the opinions, concurring opinions and dissenting opinions in the foregoing flag abuse cases before this Court, and in *O'Brien*, we believe that a commonality of views can be reached with the recognition of two important factors, which *by now*

are evident, namely, (1) based on reason and experience the inevitable consequence and effect of a flag abuse statute of this sort is that, if upheld, it would serve almost entirely as a punishment for expressive conduct by political protesters, which the legislative history confirms was the purpose of Congress; and (2) the position of the United States flag as a symbol of both national unity and sovereignty, on the one hand, and individual freedom on the other, is in no way threatened but indeed is strengthened by tolerating the kind of political expression at issue here. The history of flags and, in particular, of the United States flag as referred to in the briefs of the parties and the *amici curiae* show the tremendous emotional impact a nation's flag can have through the centuries. This presents the kind of atmosphere in which the Court needs to be diligent and courageous in protecting First Amendment rights.

We submit, moreover, that this is an appropriate occasion for application of *stare decisis*. The developing philosophy of the Court with respect to First Amendment principles encountered in attempts to punish abuse of the flag came to fulfillment in *Texas v. Johnson*. In an alternative argument in the present case, the Solicitor General recognizes that a reversal of the decisions below would require this Court to overrule *Johnson*.²⁹ This reflects the position taken in 1989 by the Department of Justice in William P. Barr's statement to the House Subcommittee.³⁰ For the reasons given by Justice Lewis F. Powell in a recent address,³¹ it would be timely for the

²⁹ Brief for the United States at 42-45.

³⁰ See *supra* note 22 and accompanying text.

³¹ The "specific merits" of *stare decisis* commented on by Justice Powell were: (1) it eases the work of the judges; (2) it enhances stability in the law; and (3) "perhaps" as the "most important and familiar," it enhances respect for the Court and provides it

Court to put to rest the present issue and announce with as near unanimity as possible that rights of free speech and expression are being exercised in the public marketplace of competing ideas when a flag is abused in an expression of political dissent.

With a demand for democracy being made by peoples throughout the world, and the common standard being the freedoms, not the power or authority, associated with the United States flag, now would seem the ideal time for the Court to demonstrate the significance and practical application of the First Amendment guarantee of freedom of speech. Conversely, if the decision went the other way, it would be sad to contemplate the precedent which oppressive governments could seize upon to stifle political expression under the guise of "neutral" restrictions. It must be assumed that this precedent will be carefully noted by friends of democracy and supporters of dictatorship throughout the world.

CONCLUSION

The Court over the past 21 years has considered four flag abuse cases and on various grounds rejected the accusations under all of them. We respectfully submit that there now is a great public need for a statement in terms that will be clear and unmistakable that, even though the general regard for the flag of the United States may approach reverence, its uniqueness among the flags of all nations, now and in history, is that it is a symbol of freedom for us and millions around the world. The cornerstone of that freedom is that we are strong enough and confident enough to tolerate differences, even to the extent of abuse of a flag as an expression of political dissent. The physical symbol of that freedom

with "public legitimacy." Association of the Bar of the City of New York, 44 *The Record* 813, 818-819 (Dec. 1989).

should not be held more sacred than the freedom it represents.

Respectfully submitted,

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May 3, 1990

APPENDIX

APPENDIX

American Bar Association Letter and Resolutions ¹

ABA
[ABA LOGO]
AMERICAN BAR ASSOCIATION
750 North Lake Shore Drive
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CHAIRMAN HOUSE OF DELEGATES
George E. Bushnell, Jr.
150 West Jefferson
Suite 2500
Detroit, MI 48226

August 21, 1989

The Honorable Don Edwards
Chairman
Subcommittee on Civil and
Constituted Rights
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

I write to advise you that at its recent meeting in Honolulu, the American Bar Association's House of Delegates, "in the interest of preserving intact the right of freedom of speech and expression under the First Amendment," overwhelmingly adopted a resolution opposing any amendment to the U.S. Constitution or enactment

¹ These appear in *Statutory and Constitutional Response to the Supreme Court Decision in Texas v. Johnson: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 101st Cong., 1st Sess. 393-95 (1989).

of federal legislation concerning desecration of the American flag. The resolution further "deplores any desecration of the flag and declares its full support for the proposition that the flag is a revered national symbol that ought to be treated with great respect by all citizens of the United States of America."

The House of Delegates adopted its policy based on the unanimous report of a special task force I had appointed to examine the numerous proposals stemming from the Supreme Court decision in *Texas v. Johnson* and to recommend ABA policy positions on these proposals. The task force was chaired by former Commissioner of the Internal Revenue Service Randolph Thrower. Its members were Columbia University Law School Dean Barbara Black; former Deputy Secretary of State Warren Christopher; former Harvard Law School Dean and Solicitor General of the United States Erwin Griswold; Stanford University Law School Professor Gerald Gunther; former New York University Law School Dean Robert McKay; former U.S. Attorney Earl Silbert; and former Secretary of State Cyrus Vance.

I am sending along to you both the adopted resolution and the report of the task force which I respectfully request be made part of the hearing record on this issue.

We of the American Bar would be pleased to provide you with any additional information you might require, or to meet with you at your convenience so that we can respond to any concerns that you might have.

Should you have any questions please contact Robert Evans, Director of our Governmental Affairs Office in Washington, D.C., at 331-2214.

Sincerely,

/s/ George E. Bushnell, Jr.
 GEORGE E. BUSHNELL, JR.
 Chairman, House of Delegates

Adopted by voice vote
 August 1989

Be it resolved, that the American Bar Association, in the interest of preserving intact the right to freedom of speech and expression under the First Amendment of the United States Constitution, opposes the adoption of an amendment to the Constitution concerning the desecration of the American flag.

Be it further resolved, that the American Bar Association opposes the enactment of federal legislation that would seek to criminalize the desecration of the American flag as a political protest.

Be it further resolved, that the American Bar Association deplores any desecration of the flag and declares its full support for the proposition that the flag is a revered national symbol that ought to be treated with great respect by all citizens of the United States of America.

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QUESTION PRESENTED

Whether the First Amendment prohibits the prosecution, under the provisions of the Flag Protection Act of 1989, of political protesters who burned a flag of the United States as part of a political demonstration?

Nos. 89-1433, 89-1434

IN THE
**SUPREME COURT OF THE
UNITED STATES**

October Term, 1989

UNITED STATES OF AMERICA,
Appellant,
v.

SHAWN D. EICHMAN, et al.

UNITED STATES OF AMERICA,
Appellant,
v.

MARK JOHN HAGGERTY, et al.

ON APPEALS FROM THE UNITED STATES DISTRICT COURTS
FOR THE DISTRICT OF COLUMBIA AND THE
WESTERN DISTRICT OF WASHINGTON

**Amicus Brief of the National Association
for the Advancement of Colored People
in Support of the Appellees**

STATEMENT OF INTEREST OF THE AMICUS CURIAE
NAACP

The National Association for the Advancement of Colored People is a non-profit membership corporation chartered by the State of New York. Its principal aims and objectives are clearly set forth in its Articles of Incorporation as follows:

Voluntarily to promote equality of rights and eradicate caste or erase prejudice among the citizens of the United States;

to advance the interests of colored citizens;

to secure for them impartial suffrage;

and to increase their opportunities for securing justice in the courts, education of their children, employment according to their ability, and complete equality before the law.

To ascertain and to publish all acts bearing upon the subjects and to take any lawful action thereon; together with any and all things which may lawfully be done by a membership corporation.

From the Battle of Bunker Hill in the Revolutionary War up through the founding of the NAACP, black Americans were willing to fight and die for the principles of freedom and democracy which make this country special, even though the rights they fought to defend were almost totally denied to them. In all wars, before and after the birth of the NAACP, black Americans defended the country, its soil and flag by force of arms and have given their lives for it. Despite the glaring inequalities that they have faced in these United States, most black Americans have loved this country and its flag, which has stood as a proud symbol of the potential for "one nation...with liberty and justice for all."

The First Amendment has been a primary instrument used by the NAACP as it

has struggled to make a reality of the rights that the flag symbolized for its constituents. After eighty-one years of exercising and defending the rights guaranteed by the First Amendment to speak out, assemble, picket, demonstrate, boycott, and petition the government, black Americans have obtained formal legal entitlement to all of the rights the flag has represented.¹

The NAACP has over 500,000 members and over 2,000 branches in the United States and overseas. Representing a typical cross section of viewpoints, many of its members are appalled at the burning

¹ As the 1990 NAACP National Convention theme "The Struggle Continues" denotes, the mere legal recognition of these rights has not meant that they are enjoyed by all of our citizens. Discrimination is still widespread in our society and the means that were used to obtain the formal rights must continue to be used to eliminate discrimination "root and branch."

of a U.S. flag as a means of protest. We proudly fly the flag in front of our national headquarters, have a special office of veterans affairs and honor those black Americans who have fought and died for the country. However, the NAACP recognizes that an individual U.S. flag is but a symbol of the important rights embodied in our Constitution, Bill of Rights, and their Amendments. It is an inanimate object that can be and is replaced regularly. On the other hand, the First Amendment comes as close as anything in our governmental legacy to being chiseled in stone. The NAACP, reflecting on the important role that the First Amendment has played in our struggle to try to create a society "where all [persons] are judged by the content of their character and not the color of their

skin," must take great interest in protecting the broad interpretation of First Amendment clauses which allow civil dissent. The potential overriding public consequences of these consolidated cases cause the NAACP to file this Amicus Curiae brief urging affirmance of the opinions of the two U.S. District Courts.

STATEMENT OF THE CASE

In its decision in Texas v. Johnson, 105 L Ed 2d 342, 109 S.Ct. 2533(1989), this Court held that the conviction, under a Texas statute, of political protestors for burning a flag during a demonstration, was violative of the First Amendment's freedom of speech clause. In response the United States Congress enacted The Flag Protection Act of 1989 which makes it illegal to burn the flag and attempts to

deny First Amendment protection to flag burning activities.

All parties to the case agree that the appellees in these consolidated cases were engaged in political protests when they set fire to several different copies of the United States flag. The parties also agree that the appellees' flag burning activity constitutes expressive conduct protected by the First Amendment.

SUMMARY OF ARGUMENT

Flag burning as a part of a political protest is, to many citizens, an offensive form of expression, but it is an expression of ideas and thus protected under the Free Speech Clause of the First Amendment to the United States Constitution. The Court should adhere to the doctrine announced in Johnson. While

the Flag Protection Act does not contain some of the defects the Court found in the Texas statute, it does not eliminate the fundamental flaw of being an unjustified restriction on the content of expressive conduct designed to convey important political messages. The flag is a highly visible and important symbol. Its destruction during political protest is a significant communication of the urgency and/or content of the message being espoused.

The fact that there may be a national consensus as to the great, and perhaps unique, value the flag has as a symbol of our nation and its underlying principles of freedom and democracy does not warrant abridging the scope of First Amendment protections. Many of the doctrines of the Constitution and its Amendments are

explicitly designed to protect minorities and minority viewpoints from the tyranny of the majority. Drawing lines around certain forms of expressive non-violent and or otherwise legal political protest limits the ability of the holders of minority viewpoints to dramatically express their idea to the public at large. Engaging in acts that are shocking to others and/or dramatic is a time-honored manner of demonstrating the urgency of a message. Having gotten the attention of public or governmental officials in this fashion, dissident minorities are often able to proceed with more civil and polite discourse. Similarly, methods of protest that at one point in history seem outrageous or threatening later become accepted as part of the political status quo.

A decision that declares one symbol of the nation as being above the First Amendment opens the door to other similar restrictions on future forms of protest that might be deemed offensive to the symbolic value of replicas of highly significant objects such as the Constitution, the Bill of Rights, the Statute of Liberty, and the Washington Monument. More importantly, the position advanced by the government invites the continued restriction of political speech due to notions of what is offensive to the majority of citizens. The degree to which unrestricted expression is a linchpin of our globally respected democratic institutions can not be underestimated. To erode that reality would be damaging not only to our citizens, but to the hopes of persons all over the world who are

struggling for the right to protest freely about conditions which they think need governmental redress.

ARGUMENT

I. THIS COURT'S DECISION IN TEXAS V. JOHNSON WAS CORRECT AND THE DISTRICT COURTS' APPLICATION OF IT IN DECLARING THESE PROSECUTIONS UNCONSTITUTIONAL WAS APPROPRIATE.

In Texas v. Johnson, supra., the Court used a three prong analysis to determine the applicability of the First Amendment to the act of burning the flag of this country as part of a political protest. The United States, by conceding that under the doctrines announced in Johnson that the acts of the appellees were expressive conduct and that regulation of those acts by the Flag Protection Act constitutes the suppression of free expression, agrees that the two District Courts in these cases were

correct in their analyses of the first two prongs of this test of First Amendment coverage. The two prosecutions are thus subject to strict scrutiny analysis. Therefore, unless the Court accepts the Government's invitation to revisit the Johnson decision, U.S. Brief, p.24, the only real issue in these cases is whether there is a compelling governmental interest in regulating this acknowledged suppression of expressive conduct significant enough to meet the strict scrutiny test. Texas v. Johnson, 105 L Ed 2d 342, 355, 357-358.

The United States argues that this case is different from Johnson in that the Congress and the President have announced that "the physical integrity of the flag of the United States, as the unique symbol of the nation, merits protection not

accorded other national emblems." U.S. Brief, pp. 27, 29. Therefore, such expressive conduct should not now be accorded full First Amendment protection. In fact, this idea is not new to the legal analysis and was fully considered by the majority in Spence v. Washington, 418 U.S. 405(1974), which conceptualized the importance as follows before proceeding with its analysis:

[I]t might be argued that the interest asserted by the state court is based on the uniquely universal character of the national flag as a symbol. For the great majority of us, the flag is a symbol of patriotism, of pride in the history of our country, and of the service, sacrifice, and valor of the millions of Americans who in peace and war have joined together to build and defend a Nation in which self-government and personal liberty endure....

But we need not decide ...whether the interest advanced by the court below is valid. We assume, *arguendo*, that it is.

Spence, 418 U.S. at 413-414(emphasis added). Other passages from the First Amendment flag cases show that this Court has long acknowledged the essence of the statements about the flag's position in our culture made by Congress and the President in supporting the passage of the Flag Protection Act.

For example, in Johnson v. Texas, the majority recognized "the dissent's quite correct reminder of the unique position that the flag occupies in our society," 105 L Ed 2d at 361 n. 11, and also stated "it cannot be gainsaid that there is a special place for the flag in this Nation," 105 L Ed 2d at 362. Justice Kennedy, in his concurring opinion expressed the difficulty of recognizing that the First Amendment permitted destruction of an item of such an

important symbolic importance: "the flag is constant in expressing beliefs Americans share, beliefs in law and peace and that freedom which sustains the human spirit." 105 L Ed 2d at 365, (Kennedy, J., concurring).

Similarly, this notion was recognized by the district courts. The opinion in Haggerty stated:

"[T]he court respects the strong feelings held by many on this issue. The court is well aware of the reverence with which many people who have sacrificed much for this country regard the United States flag."

United States v. Haggerty, 1990 U.S. District LEXIS 1652, p. 20. Therefore, the cases currently before the Court do not present any new question because all of the judges considering this issue understood the obvious significance of the flag in our society.

The Government claims the symbolic value of the flag is so great that the physical act of destroying the flag in the course of a political demonstration is "a physical, violent assault on the most deeply shared experiences of the American people, including the sacrifices of our fellow citizens in defense of the Nation and the preservation of liberty." U.S. Brief, p. 36. However, the Government cites no evidence to support this assertion other than reference to a 1968 Congressional finding that such actions "inflict an injury on the entire Nation." U.S. Brief, p. 35-36 n. 28. This statement does not in any way establish an injury of the severity urged upon us by the Government nor does it evidence an injury to anything other than the symbolic role that the flag plays in our nation's

culture. Congress has failed to establish facts which show "that the flag [is] in grave and immediate danger of being stripped of its symbolic value." Johnson, 105 L Ed 2d at 351(citations omitted). Therefore, the analysis of the instant applications of the Flag Protection Act falls squarely within the guidelines of Johnson. Despite having fully acknowledged the importance of the flag as a cultural and political symbol, the Court has refused to treat speech concerning the flag any differently than other protected speech, noting that "[w]e decline to create an exception for the flag to the joust of principles protected by the First Amendment." Johnson, 105 L Ed 2d at p. 362.

Although the standards of analysis for Johnson and these cases would seem to

be identical, these cases do involve a Congressional enactment rather than a state law. While it is true that Congressional enactments are due deference, this Court has not exhibited any hesitancy in applying high First Amendment standards to cases arising over the enforcement of Congressional enactments. Landmark Communications, Inc. v. Virginia, 435 U.S. 829(1978). For example, in Watts v. United States, 394 U.S. 705(1969), this Court sided with the First Amendment when faced with the conflict of interpreting the statute which prohibited threats on the life of the President and the safeguards of the free speech clause. The court stated:

"[W]e must interpret the language Congress chose 'against the background of a profound commitment to the principle that debate on public issues should be uninhibited, robust and wide

open and that it may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials....' The language of the political arena... is often vituperative, abusive, and inexact."

Watts, 394 U.S. at 708, (citations omitted). Clearly, words that on their face could be interpreted as a direct threat to the President of the United States were at least as great a threat to the society than the destruction of one or several copies of the flag.²

The United States argues that the restriction of expressive conduct imposed by the Flag Protection Act is not so harmful since dissidents such as the

² Amicus recognizes that the Court did not invalidate a statute in Watts, but rather said that the protections of the First Amendment must be held "clearly in mind" when interpreting the statute and held that Watts' comments were thus outside the meaning of the statutory term "threat". Watts, 394 U.S. at 707-8.

appellees in this case have "suitable alternative means to express (and others to have means to receive) whatever protected expression may be a part of their intended message...." U.S. Brief, p. 33. This argument was rejected summarily in both Spence, 418 U.S. at 411 n. 4 and Johnson, 105 L Ed 2d at 361 n. 11. The United States is in essence contending that only by being able to prosecute every instance of the physical destruction of the flag, other than for the purpose of disposing of a soiled or damaged flag, will this country be able to accomplish the goal of the "preservation of the flag as the unique symbol of our Nation." U.S. Brief, p. 29 and n 24.

Amicus urges that the Court not be persuaded by these arguments about the diminishment of the value of a primary

national symbol at the expense of broad freedom of expression. Those advocating limitations on protected expressive conduct should remember all of the options available to them for advancing the notion that the flag is an important and revered symbol of this nation's legacy of freedom and democracy. More importantly, they should remember the more fundamental ideas that the flag represents - freedom, liberty, equality and justice. The promotion of these ideas is even more important than the promotion of a symbol. The last paragraph of Section IV of the majority opinion in Johnson eloquently explains this point and concludes by reminding us all that, "We do not consecrate the flag by punishing its desecration, for in doing so we dilute the

freedom that this cherished symbol represents." Johnson, 105 L Ed at 363-4.

II. THE HISTORY OF THE FIRST AMENDMENT IN PROTECTING THE RIGHTS OF MINORITIES TO ENGAGE IN PROTESTS DESIGNED TO ACHIEVE RACIAL EQUALITY DEMONSTRATES WHY GREAT CAUTION SHOULD BE GIVEN TO ANY CONSIDERATION OF NARROWING ITS SCOPE.

The manner in which this Court has addressed First Amendment issues growing out of the struggle for equality of rights for black Americans and other minorities suggests considerations which might serve as a model for analysis of the expressive conduct now before the Court.

Before reviewing some of the contributions of the First Amendment to the struggle for equal rights, it must be pointed out that the NAACP recognizes that the First Amendment condones speech that we do not approve and in fact much that we

find abhorrent and highly offensive to our constituents. The Johnson decision reminds us of this when the Court declares:

The First Amendment does not guarantee that other concepts virtually sacred to our Nation as a whole - such as the principle that discrimination on the basis of race is odious and destructive - will go unquestioned in the marketplace of ideas."

Texas v. Johnson, 105 L Ed 2d at 362.

Despite the fact that the NAACP sometimes pushes the law as far as it will go in restricting speech that is racially offensive, we adhere to the general principle that the protections of the First Amendment for political protestors must be broad. Political protestors must

be free to make their statements in dramatic ways.³

The cases before the Court squarely represent an attempt by Congress and the President to prescribe what shall be orthodox in nationalism and patriotism. Johnson, 105 L Ed 2d at 361-362. The NAACP's members, supporters, and constituents have long struggled for equality of rights by expressing ideas in matters of politics and public policy which at the time were unorthodox. More importantly, this expression of politically charged ideas has often been by means which at the time were considered

³ Of course, there are limitations on free speech and other rulings of this Court have set forth those quite clearly. Acknowledgement of these limitations does not by any means require that one reach the conclusion advocated by the government in this case, as they were also distinguished in Johnson, 105 L Ed 2d at 356-357.

unacceptable and perhaps even threatening to the fabric of society.⁴

Civil rights protesters in the 1960's were constantly arrested on a wide variety of charges because their behavior was considered to be a threat to the status quo. Similarly, public officials tried to intimidate or interfere with the operation of civil rights groups such as the NAACP as a means of defeating the struggle for racial equality. This Court relied upon free speech and other First Amendment grounds to reject most of these practices.⁵

⁴ See the dissent of Justice Black in Brown v. Louisiana, 383 U.S. 131(1966) where he feared mob rule if totally peaceful sit-ins were allowed to continue without criminal prosecution.

⁵ These are some of the pivotal civil rights case which concretized the rights of black Americans to aggressively seek racial equality. Gibson v. Florida Legislative Committee, 372 U.S. 539(1963) (government must show an immediate, substantial and subordinating interest which is (continued...))

When reflecting on the sit-in, demonstration, litigation, and boycott cases from the civil rights movement, it

⁵(...continued)

compelling to justify impinging on First Amendment right of association in civil rights organizations); NAACP v. Claiborne Hardware Co., 458 U.S. 886(1982) (imposition of civil liability against civil rights organization and its members for losses suffered during a boycott merely because of their association violates First Amendment rights of free speech and association); NAACP v. Button, 371 U.S. 415(1963) (upheld ability of civil rights groups to provide legal services as "mode of expression and association protected by the First and Fourteenth Amendments"); Bates v. Little Rock, 361 U.S. 516(1960) (reversed convictions of local NAACP officials for refusing to produce membership list as violative of freedom of speech, assembly, and association); Shuttlesworth v. Birmingham, 394 U.S. 137(1969) (reversed conviction for demonstrating without permit where overly broad ordinance impinged upon First Amendment rights); Brown v. Louisiana, 383 U.S. 131(1966) (recognized expressive nature of sit-in demonstration by black students in segregated public library); Gregory v. Chicago, 394 U.S. 111(1969) (overturned civil rights demonstrators' disorderly conduct convictions stemming from nonviolent marching which provoked hecklers to assaults with rocks and eggs); Talley v. California, 362 U.S. 60(1960) (invalidated ordinance which prohibited anonymous pamphlets and handbills protesting denial of equal employment opportunities).

is also important to note how far we have come in accepting the right of persons to protest. From the perspective of 1990, it is sometimes hard to believe that people were arrested for such orderly and peaceful behavior in attempts to obtain the body of rights that the Johnson majority called a "virtually sacred" part of our nation's system of values.*

Wide ranging forms of non-violent expressive conduct have not led to mobs ruled by hate, passion or greed, no more so than wearing of the flag on a pair of

* For example, compare Justice Black's dissent in Brown and his majority opinion in Adderly v. Florida, 385 U.S. 39(1966) to see the frailty of the protection given to First Amendment activities in the mid-1960's. Given the rulings of the Court in the years since Adderly, it is hard to imagine that such peaceful and orderly behavior would even result in an arrest in many places today, let alone give rise to a Supreme Court decision denying First Amendment protection to the demonstrators.

jeans or the refusal to salute the flag. Despite the oft-stated fears that granting wide range to the forms of expressive conduct would lead to social disorganization, it has, to the contrary, contributed to the uninhibited, robust and wide-open debate of public issues, albeit sometimes with vehement, caustic and unpleasantly sharp attacks on governmental officials and/or political opponents.

Just as the predictions of social ruin which accompanied past attempts to limit free political expression have failed to materialize, the burning of the flag as part of political protest will not destroy the fabric of our democratic institutions and the moral core of our society.

While it is difficult to imagine that the NAACP would ever organize a demonstration that would include the

burning of a U.S. flag, we are not willing to see encroachments on the right for wide-ranging political protests which include expressive conduct. As was noted in Justice Douglas' dissent in Adderly v. Florida, 385 U.S. at pp. 50-51:

Conventional methods of petitioning may be, and often have been shut off to large groups of our citizens. Legislators may turn deaf ears; formal complaints may be routed endlessly through a bureaucratic maze; courts may let the wheels of justice grind very slowly. Those who do not control television and radio, those who cannot afford to advertise in newspapers or circulate elaborate pamphlets may have only a more limited type of access to public officials. Their methods should not be condemned as tactics of obstruction and harassment as long as the assembly and petition are peaceable.

Our constituents and similar groups representing less powerful persons often find themselves in such a position and are

dependent on the First Amendment to allow them to draw attention to their cause. * speech more effective with than without

Amicus would hope that with the passage of time, all Americans now can understand Street's expressive conduct upon hearing the news that civil rights activist James Meredith had been shot by a sniper who was hidden on the side of a Mississippi road on which Mr. Meredith was walking in a solitary march against fear. Meredith and many others risked their lives to help institute just governments at all levels of society which would secure the inalienable rights of life, liberty and the pursuit of happiness for black Americans a century after the Civil War. While the legal status of black Americans has changed dramatically since the time when Mr. Meredith was shot and

Mr. Street burned and criticized the U.S. flag, we cannot comfortably sit back and say that circumstances no longer exist which will drive someone else to make such a reaction to instances of racism in the United States.⁷ Who is to say what responses might occur from acts equivalent to recent occurrences as the killings and racial violence in Bensonhurst and Howard Beach or the bombings and attempted

⁷ Street v. New York, 394 U.S. 576(1969). Mr. Street burned and verbally insulted one of his U.S. flags after hearing that civil rights leader James Meredith had been shot. He was convicted for his affronts to the flag. The conviction was overturned on First Amendment grounds. The flag that Mr. Street burned had been neatly folded in a drawer and previously was used for display on national holidays. This is not the profile of a person who has contempt for the flag. Many of the decisions of the Courts and much of the United States' argument assume that the only person who would burn a flag is one who holds it and the country in great disregard. It is not unlikely that some who love their country and its values could burn the flag to express their outrage over certain political or social circumstances.

bombings of federal judges and NAACP offices and cooperating attorneys in the South.

There has been a tendency of many in our society at all phases of history to assume that we have attained a satisfactory level of freedom and justice and to therefore denounce as unpatriotic and subversive those who point to flaws in our society. While all of the reforms advocated by so called extremists are not eventually adopted by the political mainstream, many changes become accepted as part of the political status quo. For example, the Court in Johnson could point to the virtual sacredness of the concept of racial equality only 35 years after a controversial decision that declared institutional de jure segregation to be

unconstitutional.* We must keep the doors open so that our society can continue to grow and maintain its reputation as a world leader in championing individual rights.

We must not forget what the Court so accurately recognized in Johnson, and continue to zealously guard our grand tradition of freedom of expression:

"To conclude that the Government may permit designated symbols to be used to communicate only a limited set of messages would be to enter territory having no discernible boundaries....[H]ow would we decide which symbols were sufficiently special to warrant this unique status? To do so, we would be forced to consult our own political preferences and impose them on the citizenry, in the very way

* See Johnson, 105 L. Ed 2d 362. Brown v. Topeka Board of Education, 347 U.S. 483 (1954). However, as the recent rulings in the Yonkers and St. Louis school cases demonstrate, the struggle for equal rights is still being strongly resisted and is requiring extensive litigation.

that the First Amendment forbids." Johnson, 105 L Ed 2d at 362. The protections of the First Amendment are too precious and essential to our notion of a free society to entrust to the changing tides of political fancy that often sweep our country.

CONCLUSION

The reaction of distaste which many feel when hearing that a copy of the U.S. flag has been burned is not unlike the reaction which the Court has recognized is inherent in the life of a country which embraces democratic ideals as fully as has ours. This Court's precedents recognize:

[that a] principal function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger."

Texas v. Johnson, 105 L Ed 2d at 356 (citations omitted).

Because the NAACP so dearly appreciates the social progress it has been able to promote through exercise of the First Amendment and because it anticipates using First Amendment protections extensively in the future as it strives to complete the unfinished agenda of the civil rights revolution, we urge this Court to once again, as in Johnson, "make a decision we do not like" and to make it because it is "right in the sense that the law and the Constitution ...compel the result. Johnson, 105 L Ed 2d at 364(Kennedy, J., concurring).

Our organization and its constituents are not the only ones who appreciate the values represented by the U.S. flag. As Judge Rothstein so ably reminded us,

Countries all over the world are striving to adopt democratic principles derived from our Constitution as part of their forms of government. The freedom of speech enshrined on our First Amendment is the crucial foundation without which other democratic values cannot flourish. It is a tribute to the strength of our nation and to our faith in democratic government that even a means of protest which is profoundly painful and offensive to many people is protected.

United States v. Haggerty, 1990 U.S. District LEXIS 1652, pp. 20-21. Judge Rothstein also rejects the alarmist predictions of social ruin and places this issue in the proper perspective:

Burning the flag...does not jeopardize the freedom which we hold dear. What would threaten our liberty is allowing the government to encroach on our right to political protest. It is with the firm belief that this decision strengthens what our flag stands for that this court finds the Flag Protection Act unconstitutional as applied to defendants conduct....

Haggerty, 1990 U.S. District LEXIS 1652, at p. 21.

For the foregoing reasons, the NAACP urges the Court to follow the doctrinal trend it has established in its prior First Amendment free speech cases involving the flag and affirm these rulings declaring the Flag Protection Act unconstitutional as applied to the appellees.

Respectfully submitted,

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May 3, 1990

Supreme Court, U.S.
FILED
MAY 3 1989
JOSEPH F. SPANOL,
CLERK

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On Appeals from the United States District Courts
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**BRIEF OF PEOPLE FOR THE AMERICAN WAY,
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AS AMICI CURIAE IN SUPPORT OF APPELLEES**

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QUESTION PRESENTED

Whether the First Amendment prohibits the government from prosecuting the defendants under the Flag Protection Act of 1989, a statute which provides special punishment for persons who, through their expressive acts, knowingly damage the American flag.

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**On Appeals from the United States District Courts
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**BRIEF OF PEOPLE FOR THE AMERICAN WAY,
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THE FREEDOM TO READ FOUNDATION,
THE RADIO-TELEVISION NEWS
DIRECTORS ASSOCIATION,
THE SOCIETY OF PROFESSIONAL JOURNALISTS,
AND THE VOLUNTEER LAWYERS FOR THE ARTS
AS AMICI CURIAE IN SUPPORT OF APPELLEES**

INTEREST OF THE AMICI CURIAE

This brief is submitted on behalf of People for the American Way, the American Society of Newspaper Editors, the Freedom to Read Foundation, the Radio-

Television News Directors Association, the Society of Professional Journalists, and the Volunteer Lawyers for the Arts. *Amici curiae* are organizations that are dedicated to the protection of freedom of expression and of the press.

People for the American Way is a nonpartisan, education-oriented citizens' organization established to promote and protect civil and constitutional rights, including First Amendment freedoms. Founded in 1980 by a group of religious, civic, and educational leaders devoted to our nation's heritage of tolerance, pluralism, and liberty, the organization now has over 285,000 members nationwide. People for the American Way's own education and advocacy activities depend fundamentally on First Amendment rights, and it has a broad concern for protecting such freedoms in our country.

The American Society of Newspaper Editors was founded over 50 years ago. It is a nationwide, professional organization of more than 1,000 persons who hold positions as directing editors of daily newspapers throughout the United States. The purposes of the Society include assisting journalists in providing an unfettered and effective press in the service of the American people.

The Freedom to Read Foundation was established in 1969 by the American Library Association to promote and defend First Amendment rights; to foster libraries as institutions for fulfilling the promise of the First Amendment for every citizen; to support the right of libraries to include in their collections and make available to the public any work that they may legally acquire; and to set legal precedent for the freedom to read of all citizens.

The Radio-Television News Directors Association, with a membership of more than 3,000, is the principal professional organization of journalists—executives, editors, reporters and others—who gather and disseminate news and other information on radio and television in the

United States. It is committed to the protection of freedom of expression and of the press.

The Society of Professional Journalists is a voluntary, nonprofit organization of nearly 20,000 members. The Society is the largest and oldest organization of journalists in the United States, representing every branch and rank of print and broadcast journalism. Preservation of First Amendment freedoms of the press are of deep concern to the Society.

The Volunteer Lawyers for the Arts was founded in 1969 to provide free arts-related legal assistance to artists and arts organizations. The first organization in the United States dedicated to offering such services, it now helps those who cannot afford private counsel in all creative fields, including music, theater, film, video, literature, dance, and visual arts. Volunteer Lawyers for the Arts believes that freedom of expression is of critical importance to the work of artists, and as their representative Volunteer Lawyers is committed to the safekeeping of that freedom.

Amici believe that the defendants' political protest, while offensive to the vast majority of the American people, is expression situated at the First Amendment's core. Indeed, it is the apparent offensiveness of the expression that makes First Amendment protection important. As a practical matter, protection for speech that gladdens the hearts of the American people is hardly necessary. The First Amendment is essential to guarantee freedom for "the thought that we hate." *United States v. Schwimmer*, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting).

The amici are participating in these cases because they fear that the emotion and passion provoked by defendants' means of protest may obscure the important First Amendment rights and principles at issue here. That, in turn, could have deep and lasting effects on the First

Amendment's application in other areas. Our country and our Constitution, and the flag that symbolizes them, are not threatened by a few dissidents who burn a flag. Indeed, for nearly 200 years Congress saw no need for a statute banning flag desecration; it was not until 1968 that Congress first enacted such a statute. *See* Pub. L. No. 90-381, 82 Stat. 791 (codified at 18 U.S.C. § 700 (1968)).

This brief is filed pursuant to Rule 37.3 of the Rules of the Supreme Court. The parties have consented to its submission with letters on file with the Clerk of the Court.

SUMMARY OF ARGUMENT

The question presented in these cases is whether the government may constitutionally prosecute defendants for their overtly political acts of burning flags under the Flag Protection Act of 1989—a statute that singles out the American flag for protection against knowingly inflicted harm. We submit that the government may not do so.

A. The Flag Protection Act's prohibition is directly related to the suppression of expression. The Act, which singles out only the American flag for protection, cannot be justified as an effort merely to protect the flag's physical integrity; Congress simply has no interest in protecting the flag's physical ingredients—the cloth and dye of which it is made—for their own sake. Rather, as the Solicitor General acknowledges, the Act's prohibition can be justified only by reference to the government's interest in protecting the idea of the flag and the ideas—such as unity and respect for our Nation—that the flag represents. The government seeks to protect that interest by prohibiting expression that it believes will be damaging to those ideas. In short, the Act has as its purpose the suppression of expression that attacks the flag as a symbol, and is thus content-based.

Senator Biden, as *amicus curiae* (the “Amicus”), suggests that the Flag Protection Act is content-neutral because it purportedly regulates evenhandedly. This suggestion is incorrect as a matter of fact; the language of the Act demonstrates that Congress has forbidden flag burning only where it is likely to endanger the flag's symbolic role. Such “viewpoint” regulation is anathema to the notion of free expression. In all events, however, the Amicus' suggestion confuses “viewpoint” regulation with “content” regulation. In order to be content-neutral, as opposed to merely viewpoint-neutral, the justification for regulation must have nothing to do with content. The Flag Protection Act's justification—protection of the flag's symbolic integrity or, stated differently, protection of the flag's dignity from expression that is seen as damaging—focuses *only* on the content of the speech and the direct impact that speech has on its listeners. The conclusion that such a statute is content-based follows from the Court's decision in *Spence v. Washington*, 418 U.S. 405, 414 & n.8 (1974), where the Court held invalid a statute banning the attachment of objects to the flag, even though the statute regulated without regard to whether the actor intended to communicate a message.

In addition, a law is not “content-neutral” merely because some non-expressive conduct could come within its prohibitions. The Flag Protection Act's impact will almost invariably fall on conduct that is expressive in nature. This adverse impact gives rise to a strong inference that Congress' purpose was to restrict expression, an inference which no one has rebutted.

Any possible doubt about Congress' purpose in enacting the Flag Protection Act is resolved by the legislative history of the statute. Members of Congress repeatedly and forthrightly declared that, in protecting the flag's symbolic value, they sought to suppress those who would express themselves by damaging the flag. This Court may

look to this legislative history to confirm that Congress' purpose was speech-suppression.

B. The Solicitor General properly recognizes that this statute purposefully suppresses speech, but asks the Court to repudiate *Texas v. Johnson*, 109 S. Ct. 2533 (1989), where the Court held that purposeful speech-suppression of this type violates the First Amendment. The only argument that the Solicitor General offers to justify departing from the doctrine of *stare decisis* in that Congress, in its considered judgment, has determined that the statute ought to be held constitutional. This assertion is untenable. This Court has repeatedly reaffirmed that it is for the Court, exercising its own independent judgment, to decide whether Congress has violated the Constitution, especially when the First Amendment is at stake.

C. Laws, of course, are not necessarily invalid merely because they protect symbols of the existing order. The government may encourage respect for a symbol, and it may prevent others from interfering with its own property. Thus, for instance, the government may fly its own flags, and it may punish those who steal and damage them. The First Amendment, however, does not allow the government to regulate for the sole purpose of suppressing the speech of others, as it has so manifestly sought to do here.

Upholding the Flag Protection Act would strike at the heart of the First Amendment. Validating Congress' effort to ban expression that might damage the flag's symbolic integrity would threaten far more than the right of protestors to burn the American flag. It would provide a basis for sustaining any law, even a modern Alien and Sedition Act, designed to protect the government from criticism.

ARGUMENT

THE FLAG PROTECTION ACT VIOLATES THE FIRST AMENDMENT

These cases are "made difficult not because the principles of . . . [their] decision are obscure but because the flag involved is our own." *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 641 (1943). As both courts below recognized, the flag is a symbol of "beliefs Americans share, beliefs in law and peace and that freedom which sustains the human spirit." *Texas v. Johnson*, 109 S. Ct. 2533, 2548 (1989) (Kennedy, J., concurring). But, as both courts below also recognized, central among these beliefs, and to the First Amendment, is the principle that "the Government may not prohibit expression of an idea simply because society finds the idea itself offensive or disagreeable." *Id.* at 2544.

The facts of these particular cases, however, threaten to obscure this principle. The defendants in these cases have by their means of protest chosen to challenge the government with extreme behavior. The government has accommodated their desire, and its own desire, for a constitutional test by prosecuting the defendants under the Flag Protection Act, rather than under other statutes whose application to defendants' actions might well be constitutional. Those statutes include, for instance, statutes that prohibit willful injury to federal property, and the *Haggerty* defendants have in fact been charged under such a statute (since they allegedly burned a flag belonging to the United States Postal Service). See 18 U.S.C. §§ 1361, 1362 (1982); *United States v. Haggerty*, 89-1434, J.S. App. 2a. Likewise, they include statutes that prohibit disorderly conduct or breaches of the peace, and the *Eichman* defendants were in fact arrested under such a statute. See 22 D.C. Code Ann. § 1121 (1981);

United States v. Eichman, 89-1433, J.S. App. 3a.¹ The First Amendment does not bar prosecution under these statutes because the interests underlying those statutes can be justified without reference to the content of the regulated speech.²

Thus, the question presented in these cases is not whether defendants are immune from prosecution, but whether the government may constitutionally prosecute defendants under the Flag Protection Act of 1989—a statute that singles out the American flag for protection against knowingly inflicted harm.³ Contrary to the impression that both the government and the defendants appear to create, that Act has the greatest practical significance in a class of cases that is simply not before this Court—that class of cases in which an individual takes the simple step of engaging in orderly political protest

¹ There are, of course, stringent limits on the government's ability to prosecute protestors for committing a breach of the peace. See *Texas v. Johnson*, 109 S. Ct. at 2542. But a prosecution for setting a fire on the steps of a government building so as to impede access to that building might well be constitutional. Cf. *Arshack v. United States*, 321 A.2d 845, 849 (D.C. 1974); 9 D.C. Code Ann. § 112 (1981); 40 U.S.C. § 193f (1982).

² Thus, through other penal statutes, the government may also, in appropriate cases, prosecute a flag-burner for theft, arson, or trespass. See *Texas v. Johnson*, 109 S. Ct. at 2544 n.8.

³ The Flag Protection Act of 1989, Pub. L. No. 101-131, 103 Stat. 777 (amending Pub. L. No. 90-381, 82 Stat. 791, codified at 18 U.S.C. § 700 (1968)) provides in pertinent part:

(a)(1) Whoever knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon any flag of the United States shall be fined under this title or imprisoned for not more than one year, or both.

(2) This subsection does not prohibit any conduct consisting of the disposal of a flag when it has become worn or soiled.

(b) As used in this section, the term 'flag of the United States' means any flag of the United States, or any part thereof, made of any substance, of any size, in a form that is commonly displayed.

by the mutilation of a flag which he owns. The critical question presented by these cases, therefore, is whether the government may constitutionally provide special punishment for persons who, through their expressive acts, knowingly damage an American flag—without regard, for example, to whether they owned the flag that they damaged, or whether they were on their own property (even in the privacy of their own homes) when they did so.

The sole governmental interest in these circumstances is the protection of the idea of the flag. In other words, in these circumstances, the government's purpose is simply to punish expression that damages the idea of the flag, and the ideas for which the flag stands. The First Amendment prohibits the government from seeking that result.

A. The Governmental Interest Underlying the Flag Protection Act Is Necessarily Related to the Suppression of Free Expression

There is no doubt that defendants' overtly political acts of burning flags were "sufficiently imbued with elements of communication" . . . to implicate the First Amendment." *Texas v. Johnson*, 109 S. Ct. at 2540 (quoting *Spence v. Washington*, 418 U.S. 405, 409 (1974)). Under this Court's cases, therefore, the first pertinent issue for resolution concerns whether the Flag Protection Act is "related to the suppression of free expression." See *Texas v. Johnson*, 109 S. Ct. at 2538; *United States v. O'Brien*, 391 U.S. 367, 377 (1968). Stated differently, the Court must determine whether or not the Flag Protection Act is "content-neutral." See *Texas v. Johnson*, 109 S. Ct. at 2543; *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 298-99 (1984). Cf. *Boos v. Barry*, 485 U.S. 312, 318-21 (1988); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46-48 (1986). We think that the Flag Protection Act is plainly content-based.

1. *The Interest Underlying the Flag Protection Act Is the Protection of the Idea That the Flag Symbolizes*

This Court has consistently stated that “content-neutral” speech restrictions are those that “are justified without reference to the content of the regulated speech.” See *Boos v. Barry*, 485 U.S. at 320 (quoting *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986) (citations omitted)). The Flag Protection Act has not been, and cannot be, so justified.

Congress simply has no interest in protecting the flag’s physical ingredients—the cloth and dye of which it is made—for their own sake. *Accord*, *Kime v. United States*, 459 U.S. 949, 953 (1982) (Brennan, J., dissenting from denial of certiorari) (“The Government has no esthetic or property interest in protecting a mere aggregation of stripes and stars for its own sake”). This is most pointedly true of a privately owned flag, since the government can claim no ownership interest at all in such a flag. Nor does the Flag Protection Act seek to vindicate any other content-neutral government interest, such as avoiding bonfires in city streets. It cares not if a protestor publicly burns a bedsheet. Rather, the sole justification for this Act’s protection of the flag is that the flag has substantive meaning as a symbol of the Nation. *Accord*, *id.*; see also *Texas v. Johnson*, 109 S. Ct. at 2542-2543. In other words, “[i]t is the character, not the cloth, of the flag which the . . . [Government] seeks to protect.” *Spence v. Washington*, 418 U.S. 405, 421 (1974) (Rehnquist, J., dissenting).

As the Solicitor General concedes (Br. U.S. 28-29), the governmental interest in preserving the flag’s symbolic integrity is directly related to the content of expression concerning the flag. This is because the government has “single[d] out one set of messages, namely the set of messages conveyed by the American flag, for protection.”⁴

⁴ Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 Harv. L. Rev. 1482, 1506 (1975).

Stated differently, even if the statute were not concerned with the reason—be it apathy, negligence, contempt, or disagreement with government policy—that animates a person to harm a flag, it nevertheless is singularly concerned with the impact that that expression has on the principles of unity and nationhood—i.e., the ideas for which the flag of the United States stands. Under the Court’s cases, this governmental focus on the impact of the speaker’s expression, and the desire to suppress that expression, makes the regulation “content-based” (even if not “viewpoint-based”). See *Texas v. Johnson*, 109 S. Ct. at 2543; *Boos v. Barry*, 485 U.S. at 319.

The nature of the conduct that the Flag Protection Act prohibits confirms this conclusion. The Flag Protection Act does not prohibit all conduct involving the flag; rather, it prohibits only conduct that the government believes will damage the flag as a symbol, that is, conduct by which someone “mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon” a flag. The Act is thus precisely analogous to a statute that does not prohibit all verbal speech about the flag, but rather prohibits only verbal speech that damages the flag. Such a statute is clearly directed at suppressing expression, whether or not it specifically requires that the defendant speak with contempt, *cf. Street v. New York*, 394 U.S. 576, 593 (1969), and is distinguishable from the Flag Protection Act only in that it proscribes verbal as opposed to nonverbal expression. That distinction is “of no moment where the nonverbal conduct is expressive, as it is here, and where the regulation of that conduct is related to expression, as it is here.” *Texas v. Johnson*, 109 S. Ct. at 2545. In short, the Flag Protection Act has as its purpose the suppression of expression that attacks the flag as an idea, and is thus content-based.⁵

⁵ One amicus brief suggests that the interest underlying the Flag Protection Act is preservation of the flag as an incident of sovereignty. (Brief of the Speaker and Leadership Group of the House

While the Solicitor General concedes (Br. U.S. 28-29) that the statute is content-based, Senator Biden, as *amicus curiae* (the "Amicus"), suggests that the Flag Protection Act is content-neutral because it regulates evenhandedly, without regard to the actor's motive (Br. 9, 13). This suggestion is incorrect.

The Flag Protection Act's prohibition is very much concerned with the speaker's viewpoint. The language of the Act indicates that Congress intended by that Act only to prohibit uses of a flag that are inconsistent with the flag's representation of unity and nationhood. The Act's prohibition broadly bars any knowingly inflicted harm to a "flag of the United States." The Act defines the term "flag of the United States" to include only flags that are "in a form that is commonly displayed," and the legislative history indicates that Congress shaped this definition to exclude from the Act's strictures certain commonly-accepted uses of the flag—such as cakes decorated as the flag, pictures of the flag, and products with flags printed on them; thus, whereas a political protestor may not cut a flag into pieces at a rally, a patriotic family may cut into a flag-shaped cake at an Independence Day party. See 18 U.S.C. § 700(2)(b); H.R. Rep. No. 231, 101st Cong., 1st Sess. at 2 (1989). Moreover, the Act expressly exempts from its prohibition the disposal of a soiled or

of Representatives 19-28.) As both courts below recognized, however, the use of the flag to indicate sovereignty is itself a symbolic use. Except where the government is using its own flag to designate property as belonging to the United States, Congress' only possible interest in protecting the flag as an incident of sovereignty is to prevent or punish expressive acts amounting to rejection of that sovereignty. In other words, except in the limited instances in which the government is using government flags to designate its sovereign interest (and we do not doubt that the government could constitutionally enact a statute to protect the flag in those instances, see *infra* at n.12), preservation of the flag as an incident of sovereignty, like preservation of the flag as an emblem of nationhood, is related to the suppression of free expression.

worn flag; thus, whereas a political protestor may not burn a flag to make a point, members of the armed forces may ceremoniously burn a worn flag. See 18 U.S.C. § 700(2)(a)(2); H.R. Rep. No. 231, *supra*, at 9-10. These statutory hypocrisies makes apparent that Congress has forbidden flag burning only where "it is likely to endanger the flag's symbolic role, but [has] allow[ed] it wherever burning a flag promotes that role—as where, for example, a person ceremoniously burns a dirty flag" *Texas v. Johnson*, 109 S. Ct. at 2546. Such "viewpoint" regulation is anathema to the notion of free expression. See *Schacht v. United States*, 398 U.S. 58, 63 (1970).

In any event, as the Court made clear in *Boos v. Barry*, 485 U.S. at 319, "viewpoint" regulation and "content" regulation are separate and distinct concepts, and content regulation, like viewpoint regulation, is related to the suppression of free expression. In *Boos*, the government contended that a statute that prohibited displaying signs that would bring a foreign government into public disrepute was not content-based. *Id.* Since the statute did not express a preference for a particular idea, the Court agreed that it was not "viewpoint-based". *Id.* The Court concluded, however, that, since the government's justification—"the need to protect the dignity of foreign diplomatic personnel by shielding them from speech that is critical of their governments"—focused on the emotive impact of the speech, the statute was nevertheless content-based. *Id.* at 321. The Court stated that "a regulation that 'does not favor either side of a political controversy' is nonetheless impermissible because the 'First Amendment's hostility to content-based regulation extends . . . to prohibition of public discussion of an entire topic.'" *Id.* at 319 (quoting *Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530, 537 (1980)). See also *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. at 48.

The purported justification for the Flag Protection Act is no less content-based than was the government's justification in *Boos*. Here, Congress' interest is in protecting the flag's symbolic integrity; indeed, according to the Amicus (Br. 21), "any flag protection statute will necessarily be designed to protect the flag's symbolic value[.]" To protect the flag's symbolic integrity, however, is to protect the flag's dignity by shielding it from expressive conduct that is damaging to it. As in *Boos*, this justification focuses "only on the content of the speech and the direct impact that speech has on its listeners." *Boos*, 485 U.S. at 321. See *Texas v. Johnson*, 109 S. Ct. at 2543. It is therefore content-based.

This conclusion follows directly from the Court's holding in *Spence v. Washington*. In *Spence*, the defendant affixed a peace symbol to a flag that he owned and displayed the flag out of his apartment window. The state prosecuted him under a statute that provided that "nothing . . . [could] be affixed to or superimposed on a United States flag or a representation thereof." 418 U.S. at 414 n.9 (emphasis in original).⁶ In other words, the operation of the statute did not depend on whether the viewpoint expressed was favorable or unfavorable to the flag. Indeed, in dissent, then-Justice Rehnquist emphasized that the statute in issue did "not depend upon whether the flag is used for communicative or noncommunicative purposes; upon whether a particular message is deemed

⁶ As quoted in *Spence*, 418 U.S. at 407 (omissions in original quote), the statute provided, in pertinent part:

No person shall, in any manner, for exhibition or display:

(1) Place or cause to be placed any word, figure, mark, picture, design, drawing or advertisement of any nature upon any flag, standard, color, ensign or shield of the United States or of this state . . . or

(2) Expose to public view any such flag, standard, color, ensign or shield upon which shall have been printed, painted or otherwise produced, or to which shall have been attached, appended, affixed or annexed any such word, figure, mark, picture, design, drawing or advertisement

commercial or political; upon whether the use of the flag is respectful or contemptuous; or upon whether any particular segment of the State's citizenry might applaud or oppose the intended message." *Id.* at 422-423. The Court nevertheless overturned the conviction, finding the statute unconstitutional as applied to the defendant's activity. *Id.* at 414. In doing so, the Court expressly held that the state's "interest in preserving the national flag as an unalloyed symbol of our country" was "directly related to expression in the context of activity like that undertaken by appellant." 418 U.S. at 412, 415 & n.8. This is because, as Justice (then-Judge) Scalia has explained in describing *Spence*, the only reason to prevent misuse of a flag is "related to the communicative content of the flag." *Community for Creative Non-Violence v. Watt*, 703 F.2d 586, 624-625 (D.C. Cir. 1983) (Scalia, J., dissenting), reversed sub nom., *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984).

The Amicus also errs in suggesting (Br. 11-13) that the Act is content-neutral merely because some non-expressive conduct could come within its prohibition. It cannot seriously be argued that this statute was designed to reach non-expressive conduct. The principle is well-established that the reasonably foreseeable effect of a legislative act gives rise to a "strong inference" that Congress intended the statute's predominant effect. See *Personnel Adm'r v. Feeney*, 422 U.S. 256, 279 n.25 (1979); *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 464 (1979). Here, the Flag Protection Act's impact will almost invariably fall on conduct expressive in nature; it is virtually inconceivable that someone would knowingly burn an unsoiled flag for any other reason.

While evidence of another purpose may defeat that inference, no one has provided an explanation for this statute other than a desire to suppress speech. Thus, the statute must be held to have speech-suppression as its purpose. To conclude otherwise would, in effect,

permit Congress to insulate its legislation from the First Amendment by simply extending a statute's prohibition to cover some potential, though in practice unlikely and trivial, non-expressive conduct. This Court should not allow Congress to so immunize its speech-suppressing actions.⁷

2. *The Legislative History Confirms Congress' Purpose to Suppress Expression and Provides an Independent Reason to Invalidate the Act*

Any possible doubt about Congress' purpose in enacting the Flag Protection Act is resolved by the legislative history of the statute. That history confirms that, in enacting the Flag Protection Act, Congress sought to preserve the flag's symbolic value, and that it sought to do so through the suppression of expression that would adversely affect this symbol.

Both the Senate bill and the House bill, in seeking to protect the flag's physical integrity, were clearly concerned with protecting the flag's symbolic value. *See* S. 1338, 101st Cong., 1st Sess. (1989); H.R. 2978, 101st Cong., 1st Sess. (1989); S. Rep. No. 152, 101st Cong., 1st Sess. 2 (1989); H.R. Rep. No. 231 at 2. Indeed, the Senate Committee Report candidly acknowledged:

In seeking to protect its physical integrity, Congress is simply ratifying the unique status conferred upon the flag by virtue of its historic function as the emblem of this Nation.

S. Rep. No. 152, *supra*, at 3; *see also id.* at 5 (reiterating that "S. 1338 is intended to protect the flag because

⁷ Because the Flag Protection Act is content-based, it does not qualify for the more lenient treatment that content-neutral time, place, or manner restrictions receive. *Accord, Police Dep't v. Mosley*, 408 U.S. 92, 95-96 (1972); *Boos*, 485 U.S. at 321. The fact that alternative channels of communication supposedly exist is thus irrelevant. *Accord, Texas v. Johnson*, 109 S. Ct. at 2546 n.11; *Spence*, 418 U.S. at 411 n.4.

of what it expresses and represents"). On the House and Senate floors, the statute's purpose was made equally clear:

No one claims that we are interested in protecting the material, the thread, and the dye in the flag. We protect the flag as a symbol, including against those who would desecrate the flag as part of a political expression.

135 Cong. Rec. S12,579 (daily ed. Oct. 4, 1989) (statement of Sen. Hatch). *See also* 135 Cong. Rec. S12,621 (daily ed. Oct. 4, 1989) (statement of Sen. Dole) ("Americans want to protect the flag because they want to protect it as the symbol of our Nation. Americans . . . are not concerned about the cloth, the fabric, the red, white, and blue dye, the physical components of the flag."); 135 Cong. Rec. H5509 (daily ed. Sept. 12, 1989) (statement of Rep. Alexander) ("the flag is more than cloth and color").

The legislative history similarly confirms that, in seeking to protect the flag's symbolic value, Congress intended to do so through the suppression of expression. As Senator Roth, a principal sponsor of the bill, explained:

[W]hen America's detractors violate our flag—whether in the alleys of Iran or on the streets of Dallas—they are insulting all who have given so much—they are insulting all who believe so strongly in the values symbolized by the flag. And they are assaulting those very values. And that is why this bill is so important.

135 Cong. Rec. S12,584 (daily ed. Oct. 4, 1989). Senator Gramm likewise stated:

I cannot imagine a situation [sic] in which someone would desecrate the American flag other than to make a political statement about hating America

and its great institutions. So I intend to vote for this bill.

135 Cong. Rec. S12,600 (daily ed. Oct. 4, 1989). Senator Heflin thus added:

Although it is not often that someone destroys an American flag, the power of this image and the symbol dictate that we must protect its integrity. Allowing the legal burning of the flag would create a mockery of the great respect so many patriotic Americans have for the flag.

135 Cong. Rec. S12,577 (daily ed. Oct. 4, 1989). In short, members of Congress repeatedly and forthrightly declared that, in protecting the flag's symbolic value, they sought to enact a statute that would suppress those who would express themselves by damaging the flag.⁸

The Amicus responds (Br. 16-19) that the Court may not properly resort to the legislative history of the Flag Protection Act to confirm that its purpose is speech-suppression. This claim is contradicted by the Amicus' own repeated resorts (Br. 27-30) to this history to demonstrate that Congress was attempting to enact a constitutional statute—or at least to insulate its actions from constitutional challenge. It is, of course, unnecessary to resolve the Amicus' claim, since the statute in fact has no conceivable purpose other than the suppres-

⁸ Although he acknowledges (Br. 16) that "some legislators were motivated more by a desire to reach conduct conveying one particular message," the Amicus incorrectly asserts (Br. 16 n.6) that it was only the proponents of a constitutional amendment who were improperly motivated. The legislative history quoted above demonstrates that members of Congress who spoke in favor of the statute desired to suppress expression. See also 135 Cong. Rec. H5501 (daily ed. Sept. 12, 1989) (remarks of Rep. Brooks); 135 Cong. Rec. S12,611 (daily ed. Oct. 4, 1989) (remarks of Sen. Kohl); 135 Cong. Rec. H6996 (daily ed. Oct. 12, 1989) (statement of Rep. Smith); 135 Cong. Rec. H5512 (daily ed. Sept. 12, 1989) (statement of Rep. Lowey); 135 Cong. Rec. S12,616 (daily ed. Oct. 4, 1989) (remarks of Sen. Wilson).

sion of expression. But, in any event, it is clear that the Court may properly look to the legislative history in determining whether the Flag Protection Act has a speech-suppressing purpose.

Inquiry into whether a legislature has acted with an improper motive is an appropriate tool of constitutional review, and discovery of an improper motive provides an independent reason to subject a legislative decision to exacting scrutiny. If the legislative history discloses an improper purpose, the Court should subject the legislative decision to the same scrutiny that it would receive if the illicit objective were reflected on the statute's face. While the Court must be cautious in drawing conclusions based on inquiries of this type, its duty to enforce the Constitution requires that it consider all evidence of unconstitutional motive and invalidate any legislative acts—even acts otherwise within the power of the legislature to enact—that are infected by such motive. Cf. *City of Richmond v. United States*, 422 U.S. 358, 378-379 (1975) (holding that, under the Voting Rights Act, even if an annexation would otherwise be valid, it is unconstitutional if motivated by discriminatory intent). See also, Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 Sup. Ct. Rev. 95, 116-130.⁹

For this reason, the Court has regularly inquired into unconstitutional motives, and invalidated legislation solely on that basis. For instance, in the context of equal protection challenges under the Fourteenth Amendment, the Court has reviewed for, and indeed required, intent to discriminate. See, e.g., *Washington v. Davis*, 426 U.S. 229, 239-245 (1976); *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 264-268

⁹ This, of course, is a far different question than the relevance of legislative history to an issue of statutory construction. One need not agree with the utility of legislative history for that purpose in order to recognize its relevance to a constitutional inquiry that turns upon improper motive.

(1977). Similarly, in the context of establishment clause challenges under the First Amendment, the Court has reviewed for, and invalidated where it found, an intent to advance religion. *See, e.g., Edwards v. Aguillard*, 482 U.S. 578, 585-594 (1987); *Wallace v. Jaffree*, 472 U.S. 38, 55-56 (1985); *Stone v. Graham*, 449 U.S. 39, 40-41 (1980). There is no reason for treating free expression challenges under the First Amendment differently, and the Court has not done so. *See, e.g., Boos v. Barry*, 485 U.S. at 319-321 (suggesting that the legislature's "desire" is relevant); *Board of Educ. Dist. No. 26 v. Pico* 457 U.S. 853 (1982) (remanding a free expression challenge under the First Amendment to the district court to determine whether the government officials had acted with improper motive).¹⁰

To be sure, the Court in *O'Brien*, 391 U.S. at 384-385, eschewed such an inquiry into legislative motive, and, later, in *Palmer v. Thompson*, 403 U.S. 217, 224-226 (1971), the Court heavily relied on *O'Brien's* reasoning in expressing an unwillingness to inquire into illicit motivation. However, in *Washington v. Davis*, the Court expressly repudiated that reasoning, stating that, "[t]o the extent that *Palmer* suggests a generally applicable proposition that legislative purpose is irrelevant in constitutional adjudication, our prior cases . . . are to the contrary" 426 U.S. at 244 n.11. *See also Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Rev-*

¹⁰ *See Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 811-813 (1985) (remanding the case for determination of whether the executive order at issue was motivated by a desire to suppress a particular point of view, because the "existence of reasonable grounds for limiting access to a nonpublic forum . . . will not save a regulation that is in reality a facade for viewpoint-based discrimination."); *id.* at 833 (Stevens, J., dissenting) ("Everyone on the Court agrees that the exclusion of 'advocacy' groups from the Combined Federal Campaign (CFC) is prohibited by the First Amendment if it is motivated by a bias against the views of the excluded groups.").

enue, 460 U.S. 575, 580, 592 (1983) (expressing doubt about *O'Brien's* statement concerning legislative purpose and implying that illicit legislative motive is a sufficient, although not a necessary, reason to find a violation of the First Amendment).

Were the conclusion otherwise, improperly motivated legislative actions would often be immune from judicial review. The restraints of the First Amendment, or indeed any constitutional provision in which motive is a relevant consideration, would not apply as long as the government was careful not to declare its unconstitutional purpose on the statute's face. The Constitution's prohibition on improperly motivated government action cannot be so easily avoided.

B. Contrary to the Solicitor General's Argument, This Court Should Not Defer to Congress

The Solicitor General candidly recognizes that the statute is designed to suppress expression and that it runs afoul of the Court's decision in *Texas v. Johnson*. Indeed, the Court has repeatedly held that the government's interest in protecting the flag as a symbol is not sufficiently compelling to suppress political protest involving the flag. *See Texas v. Johnson*, 109 S. Ct. at 2545; *Spence*, 418 U.S. at 415; *Street*, 394 U.S. at 593; *Barnette*, 319 U.S. at 642. The Solicitor General thus urges that this Court overrule *Johnson* and, presumably, its decision in *Spence* as well. The Solicitor General has not, however, even remotely offered the "special justification" demanded for departure from the doctrine of *stare decisis*. *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984).

The only justification that he suggests is that Congress, in its considered judgment, has determined that the statute ought to be held constitutional. This suggestion is untenable. Indeed, the Court squarely rejected such a suggestion just last Term (in a case that the gov-

ernment does not cite). See *Sable Communications of California, Inc. v. F.C.C.*, 109 S. Ct. 2829 (1989).

In *Sable*, in response to the government's suggestion that the Court should defer to Congress' judgment (including its legislative findings), the Court emphatically reaffirmed that it is for the Court, exercising its own independent judgment, to decide whether Congress has violated the Constitution. *Id.* at 2838. That proposition has been accepted since *Marbury v. Madison*, and it has special force when a statute implicates the First Amendment. *Id.* "Were it otherwise, the scope of freedom of speech and of the press would be subject to legislative definition and the function of the First Amendment as a check on legislative power would be nullified." *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 844 (1978). See also *id.* at 843; *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., dissenting); *F.C.C. v. League of Women Voters*, 468 U.S. 364, 388 n.18 (1984); *Sable*, 109 S. Ct. at 2838. No different conclusion is permissible in the context of this Act.¹¹

C. Sustaining This Statute Would Threaten First Amendment Protection for All Speech Critical of the Government

In arguing that the Flag Protection Act is unconstitutional, we do not mean to suggest that the government cannot promote the American flag as a symbol. *Accord*, *Texas v. Johnson*, 109 S. Ct. at 2547. The government through its own speech may encourage respect for that

¹¹ The United States' and the Amicus' reliance on *Columbia Broadcasting System v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973), is misplaced. In *Columbia Broadcasting*, the Court took pains to reiterate that it will not defer to Congress on a constitutional question. *Id.* at 103. Indeed, any weight that the Court did give to Congress' judgment in that case was because "the broadcast media pose unique and special problems not present in the traditional free speech case." *Id.* at 101.

symbol, and it may even prevent others from physically interfering with the government's own speech. By flying the flag from a post office building, for instance, the government is engaging in such encouragement, and it has an interest in preventing a protestor from mutilating a flag—i.e., a symbol—that the government has displayed.¹² The First Amendment, however, does not allow the government to regulate simply to suppress the speech of others, as it has so manifestly sought to do through the Flag Protection Act.

Upholding the Flag Protection Act would thus have deep and lasting effects on the First Amendment. Validating Congress' effort to ban expression that might damage the flag's symbolic integrity would threaten far more than the right of protestors to burn the American flag. If Congress may enact a statute that protects the integrity of one symbol—the flag—there is no defensible principle on which Congress can be stopped from protecting the integrity of any other symbol. Congress could thus pass laws protecting copies of the Declaration of Independence, copies of the Constitution, pictures of the President, or replicas of important memorials.

¹² Congress could thus craft a statute to prohibit mutilation of a flag that the government owned, and could prosecute defendants, such as the *Haggerty* defendants, who burn flags belonging to a United States Post Office. Such a statute would be similar to a statute that prohibited spray painting the Washington Monument, where the government clearly has an interest in maintaining the aesthetic integrity of its own property. The Flag Protection Act, however, is not limited to protection of the government's own speech, or the preservation of the government's own property, nor can it be. Because "there is no core of easily identifiable and constitutionally proscribable conduct that the statute prohibits[.]" it is plainly overbroad. *Secretary of State v. Joseph H. Munson Co.*, 467 U.S. 947, 965-966 (1984). See also *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973); *City of Houston v. Hill*, 482 U.S. 451, 458-467 (1987).

More troubling still, if the Flag Protection Act were upheld, there would be no defensible principle on which to stop Congress from banning verbal, as well as non-verbal, expression. As noted in *Texas v. Johnson*, the line between speech and expressive action in this context is nonexistent. See 109 S. Ct. at 2545. Expression and conduct are intertwined in virtually all communicative behavior, and defiant or contemptuous words can strike as deeply as nonverbal expression. Thus, if the government may prohibit nonverbal attacks on the symbolic value of the flag, it can prohibit verbal attacks on that symbol. If it can prohibit verbal attacks on the symbol of the flag, it can prohibit verbal attacks on other, indeed all, symbols of our national unity. It could also prohibit criticism of the nation, and the government, for which those symbols stand. Sustaining such legislation would erase a shared view of the First Amendment going back to the very foundation of our Nation.¹³ Preserving the right of our citizens to criticize the government and its symbols is vital to the cherished function of this nation's press, its public libraries, its artists, and those who dissent from our government's policies. It is indispensable to the Nation itself.

¹³ It is now generally accepted that the Alien and Sedition laws, which barred criticism of the government, are the quintessential example of the type of regulation that the First Amendment is designed to forbid. See *New York Times v. Sullivan*, 376 U.S. 254, 273-275 (1964). Sustaining this statute threatens to validate a modern version of those discredited laws.

CONCLUSION

The judgments of the district courts should be affirmed.

Respectfully submitted,

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May 3, 1990

MAY 2 1990

JOSEPH F. SPANIOLO, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

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Leon Golub, Sol LeWitt, Carl Andre, Jon Hendricks, and Richard Serra submit this brief as *amici curiae* in support of appellees in both cases. The parties to these actions have given their written consent to the filing of this brief pursuant to Rule 36.2 of the Rules of this Court. The letters of consent have been filed with the Clerk.

INTEREST OF THE *AMICI*

The *amici curiae* are fourteen renowned artists, one Pulitzer Prize-winning editorial cartoonist, and one Oscar-winning motion picture director and producer. With some variation, these are the same *amici* who filed an *amici curiae* brief in *Texas v. Johnson*, 109 S. Ct. 2533 (1989) ("*Johnson/Artists' Brief*").

The artists' work—sculpture, paintings, constructions, prints, performances, editorial cartoons, motion pictures—represents visual artistic expression in a variety of media and exemplifies the major artistic movements since the 1940s: Abstract Expressionism, Minimalism, Pop Art, Conceptual Art, Performance Art, Political Art, and Feminist Art. Works of these artists are parts of the permanent collections of major museums in the United States and abroad, including the Museum of Modern Art and the National Gallery of Art, and many of the *amici* have exhibited, singly and in group shows, in museums throughout the world. Several have been American representatives to the Venice Biennale, most have participated in one or more Documenta International Exhibitions in Kassel in the Federal Republic of Germany, and nearly all have exhibited in the Biennial at the Whitney Museum of American Art. In addition, several *amici* have received major fellowships and awards.

Many of the *amici* have used flags in their work. Two of them, Faith Ringgold and Jon Hendricks, were convicted of violating New York's flag desecration statute when they organized a 1970 exhibition of works using the American flag. The works of several other *amici* were shown in that exhibition.

The work of visual artists is meant to be seen, and although artists may use words as part of their expression, they usually communicate through the use of recognized images, many of which are symbolic. Elimination of any symbol from the visual vocabulary, especially one as powerful and eloquent as the American flag, necessarily impoverishes the expressive vocabulary and stifles the creative process. The Federal Flag Protection Act of 1989, Pub. L. 101-131, 103 Stat. 777, has just such an inhibiting effect. Accordingly, the *amici curiae* share a deep concern that the government not subvert *Johnson* with a so-called content-neutral statute which criminalizes expressive conduct that *Johnson* held to be protected by the First Amendment.

SUMMARY OF ARGUMENT

The Flag Protection Act of 1989, which amended 18 U.S.C. § 700, makes it an offense to mutilate, deface, physically defile, burn, maintain on the floor or ground, or trample any flag of the United States. *Amici* contend that the statute as applied to artistic expression like theirs violates the First and Fifth Amendments because it is vague, overbroad, content based, and not justified by any compelling interest.

I. Due process requires that people not be required to guess at the meaning of a criminal statute. Yet several terms of amended Section 700—"flag of the United States," and most of the proscribed acts—are vague and require such guesswork.

A. In particular, the definition of "flag of the United States" is too vague to permit an artist to determine what it encompasses. It is unlikely that the statute is restricted to "official" flags because if that were its intent, Congress could have said so in unmistakable terms. Nor can an artist assume from the statute that it excludes pictures or representations of flags, and to do so would lead to absurd results. The Senate and House Reports are equivocal about the definition of flag. Because the original Senate bill never intended

to change the prior broad definition, its report does not address the issue. The House Report, although purporting to define "flag," does not resolve the artist's definitional dilemma, because its rationale for excluding some flags does not make sense and avoids any mention of the bulk of artistic work.

B. The statute's description of the proscribed conduct is similarly confusing. Does "trampling" include stepping or walking on a flag, and does "mutilating" include a partially created flag? "Deface" includes the meaning "to mar," and "defile" includes the meaning "dishonor," both of which are inherently subjective.

Because its essential terms are so vague, Section 700 neither sufficiently describes a flag nor the proscribed conduct. The result is that artists seeking to avoid prosecution are likely to censor their own work and forgo creating protected expression. In addition, enforcement of the statute is left to the personal interpretations of law enforcement officers, juries, and judges, contrary to the Fifth Amendment's due process requirements.

II.A. The flag desecration statute is overbroad because it reaches a substantial quantity of the clearly protected expression of artists who employ a flag or the image of a flag.

B. In the context of protected artistic expression, the flag desecration statute violates the First Amendment because it is content based but not justified by any compelling interest. It is evident from the statute's face that it is intended to criminalize expressive uses of the symbol of the flag that dishonor the flag and what it represents to the majority. First, it exempts conduct which accomplishes a specific purpose—disposal of worn or soiled flags—thereby exempting the traditional, respectful form of flag disposal. Second, some of the proscribed conduct is described with verbs normally used to describe disrespectful conduct. Other proscribed conduct has no effect on the physical integrity of flags—the asserted gov-

ernmental interest—and was explicitly chosen to suppress protected artistic expression. The legislative history corroborates what is clear from the statute's language—that it is content based.

Because the statute is content based, it survives only if the government advances a compelling interest to justify it. The government does not. No one explains what interest the government has in the physical integrity of all flags—in all its manifestations—in the private possession of the people. Even if a flag is destroyed, the nation's interest in the flag as a symbol is not jeopardized. More importantly, the government does not supply the compelling justification for interfering with free speech. Finally, there is no support for exempting the flag from the First Amendment. Indeed, doing so would mirror some of the more disgraceful moments of our history when the flag has been used as an icon by political movements that attempted to ostracize ethnic, racial, or philosophical minorities. The flag as a symbol of our nation best represents the essence of America when it protects the freedom to express diverse views, including those that are unorthodox.

ARGUMENT

I

THE FEDERAL FLAG DESECRATION STATUTE IS UNCONSTITUTIONALLY VAGUE

The Flag Protection Act of 1989, Pub. L. 101-131, 103 Stat. 777 ("Flag Protection Act"), amended 18 U.S.C. § 700 ("Section 700" or "the flag desecration statute") to read in pertinent part:

(a)(1) Whoever knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon any flag of the United States shall be fined under this title or imprisoned for not more than one year, or both.

(2) This subsection does not prohibit any conduct consisting of the disposal of a flag when it has become worn or soiled.

(b) As used in this section, the term "flag of the United States" means any flag of the United States, or any part thereof, made of any substance, of any size, in a form that is commonly displayed.

"Due process requires that all 'be informed as to what the [government] commands or forbids,' and that '[people] of common intelligence' not be forced to guess at the meaning of the criminal law."¹

The flag desecration statute violates the Due Process Clause of the Fifth Amendment because several of its terms—"flag of the United States," "mutilates," "defaces," "physically defiles," and "tramples"—are insufficiently clear to give the requisite constitutional notice of what conduct is forbidden. *Goguen*, 415 U.S. at 572-73. This vagueness threatens to inhibit the creative process of artists who use the flag as a form of expression, by forcing them to refrain from creating even protected works for fear of risking criminal penalties. See *Baggett v. Bullitt*, 377 U.S. 360, 361, 372-73 (1964) (invalidating an oath required of school teachers that they would "by precept and example promote respect for the flag and the institutions of the United States and the State of Washington" because its vagueness might impel them to steer wide of the unlawful zone and forgo protected speech).

Not only does the statute chill artists' creativity, but it ignores what this Court has characterized as the "more important aspect of the vagueness doctrine . . . '—the requirement that a legislature establish minimal guidelines to govern law enforcement.' " *Kolender v. Lawson*, 461 U.S. 352, 358 (1983), quoting *Goguen*, 415 U.S. at 574. Because its terms are so vague, the statute facilitates arbitrary and discriminatory enforcement by law enforcement officers, prose-

¹ *Smith v. Goguen*, 415 U.S. 566, 574 (1974), quoting *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939), and *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926).

cutors, and juries, unfamiliar with artistic expression that relies upon symbolism. *Lawson*, 461 U.S. at 358; *Goguen*, 415 U.S. 575.

In circumstances like this, "[w]here a statute's literal scope . . . is capable of reaching expression sheltered by the First Amendment, the [vagueness] doctrine demands a greater degree of specificity than in other contexts." *Goguen*, 415 U.S. at 573.

A. What Is A "Flag Of The United States"?

1. "A flag may be considered from two aspects: (1) as a physical object, and (2) as a symbol of ideas."² Part of the difficulty of interpreting the meaning of "flag of the United States" is related to this dual function.

As physical property, the government's flags, whether those flown over government buildings or particular historical flags maintained in the Smithsonian Institution, are like other government property, whether office or historic buildings, such as the Lincoln Memorial or the Tomb of the Unknown Soldier, or particular historical documents in the National Archives, such as the Constitution or the Declaration of Independence. The physical integrity of all such government property is treated the same—through criminal statutes proscribing injury to or destruction of government property, e.g., 18 U.S.C. §§ 1361, 1363. See, *Goguen*, 415 U.S. at 594 (Rehnquist, J., dissenting).

But flags are also symbols. "Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind." *Board of Education v. Barnette*, 319 U.S. 624, 632 (1943). "Such a primary symbol, likely to be recognized by all who see it, speaks when it is placed in odd positions, conjoined with symbols or words, or made the butt of grimaces, speech or

² *State v. Spence*, 5 Wash. App. 752, 490 P.2d 1321, 1323 (1971), rev'd, 81 Wash. 2d 788, 506 P.2d 293 (1973) (en banc), rev'd, 418 U.S. 405 (1974).

gestures." *Goguen v. Smith*, 471 F.2d 88, 99 (1st Cir. 1972), *aff'd*, 415 U.S. 466 (1974).

It is the essence of a symbol that it can be endlessly duplicated. Whatever its form, and even if any one particular representation is destroyed, the symbol does not lose its expressive force so long as people associate with it ideas or institutions. If the association is strong, the symbol's power continues so long as anyone is capable of imagining it, and any effort to destroy the association by destroying the symbol will be futile. *See Texas v. Johnson*, 109 S. Ct. 2533, 2547 (1989). Thus, so long as the flag's association with its referent remains in a person's mind, destruction of any one flag does not destroy the symbolism.³ *Goguen*, 415 U.S. at 587 (White, J., concurring) (destruction of any one flag does not "interfere with its design and function").

The stars and stripes are indisputably a powerful symbol of America, that very strength accounting for the extraordinary variety of the flag's meanings as a symbol: patriotism, imperialism, capitalism, freedom. "It belongs as much to the defeated political party, presumably opposed to the government, as it does to the victorious one. Sometimes the flag represents government. Sometimes it may represent opposition to government. Always it represents America—in all its marvelous diversity." *Parker v. Morgan*, 322 F. Supp. 585, 588 (W.D.N.C. 1971) (three-judge court).

The art history of the United States is rich with images of the flag, including work of varied kinds in the fine arts, poster and graphic arts, folk art, the art of the editorial cartoonist, and motion pictures.⁴ Although a flag may symbolize

3 "Semanticists know that the word is not the thing; the symbol is not the referent. The four-letter word 'flag' is not the piece of cloth itself; nor is that cloth with the stars and stripes the freedom it signifies; nor is the Fourth of July the actual spirit of independence." W. Safire, *Fourth of July Oration*, N.Y. Times, July 3, 1989, at 19, col. 6 ("Safire").

4 *See, e.g., Johnson/Artists' Brief*, App. 3a-21a; K. HINRICHS, STARS & STRIPES (1987) (lodged with the Court to accompany the *Johnson/Artists' Brief*) ("HINRICHS"); B. MASTAI AND M.D. MASTAI, THE STARS AND THE

the United States, it has served, because it is so well recognized, to convey other concepts as well.⁵ The sentiments expressed may be positive, critical, whimsical, or just nonsensical. Whatever its meaning, however, the flag has served as a vehicle of artistic expression.

2. Against this background of the flag as a symbol, we consider the meaning of "flag" in Section 700. Although the statute imposes criminal penalties for desecrating "any flag of the United States," the statute provides little guidance about what is included in that term. However, the diversity of the flag's symbolism imposes upon Congress a heavy burden of describing the offense with sufficient precision so that artists need not speculate whether their work risks criminal prosecution and police officers do not enforce it arbitrarily.

It is unlikely that "any flag of the United States" is intended to apply only to "official" U.S. flags, because Congress could have said that in unmistakable language. Moreover, given the wide historical variation of U.S. flags, that limitation is unhelpful.⁶ Without clarification, it would be

STRIPES: THE AMERICAN FLAG AS ART AND AS HISTORY FROM THE BIRTH OF THE REPUBLIC TO THE PRESENT (1973) ("MASTAI"), and its extensive collection of flag art; Oliver Stone's *Born on the Fourth of July* (Universal Pictures 1989) (which includes newsreel footage of a flag burning during anti-war demonstrations in Chicago, Illinois); *Common Ground* (CBS television mini-series, March 25, 27, 1990) (recreates flag burning during riot and flag used as bayonet during demonstration, both associated with school integration order); *see also* Petition for a Writ of Certiorari, Exhibits A-J, *Long Island Vietnam Moratorium Committee v. Cahn*, No. 69-709 (U.S. S. Ct. filed Sept. 16, 1970) (historical examples of flag used in political contexts) ("Vietnam Moratorium Petition").

5 *See, e.g., H. ROSENBERG, Jasper Johns: "Things the Mind Already Knows," THE ANXIOUS OBJECT* 177 & n.* (1966) ("I went on [from the American flag] to similar things like targets, things the mind already knows, that gave me room to work on other levels'").

6 That Americans accepted a wide variety of designs as "the flag of the United States" (*see generally* MASTAI, *supra* note 4) was highlighted by

perilous for an artist to assume the statute excludes technically incorrect portrayals of the flag, *e.g.*, flags with 47 stars or twelve stripes, which most people would recognize as American flags.

Nor could an artist assume that the words "in a form that is commonly displayed" exclude pictures or representations of the flag.⁷ For most, a flag is a flag whether it is three-dimensional or two-dimensional. To say otherwise leads to absurd results: a picture of a flag on a magazine cover is not a flag, but becomes one when cut out and attached to a stick.⁸ The conclusion that depictions of flags are included is reinforced by the statute's references to flags "made of any substance" and "of any size."

The congressional reports accompanying the legislation are equivocal at best. The Senate Report says nothing about the definition of "flag," probably because the Senate bill (S.

Representative Wendover when he introduced his resolution in 1818 for the establishment of a regulation flag design:

I would refer you to the flag at this moment waving over the heads of the Representatives of the nation, and two others in sight, equally the flags of the Government: while the law directs that the flag shall contain fifteen [stripes], that on the hall of Congress, whence laws emanate, has but thirteen, and those at the Navy Yard and Marine Barracks have each at least eighteen stripes. Nor can I omit to mention the flag under which the last Congress sat during its first session, which, from some cause or other unknown to me, had but nine stripes.

S.M. GUENTER, *THE AMERICAN FLAG, 1777-1924: CULTURAL SHIFTS FROM CREATION TO CODIFICATION* 47 (to be published by Associated University Presses, Cranbury, N.J., Summer 1990) ("GUENTER"). John Paul Jones's 1779 flag sported tricolored stripes—alternating red, white and blue. *Id.* at 33.

⁷ It would also be conjecture to assume that "in a form that is commonly displayed" is meant to exclude flags (albeit recognizable as United States flags) created in unorthodox media or designs—*e.g.*, a flag painted on a man's face (*Johnson/Artists' Brief*, App. 4a), or depicted in strange colors (*id.* at 11a), or incorporating the flag designs of other countries (*id.* at 16a).

⁸ If the statute were intended to include only three-dimensional flags, it would also be subject to equal protection challenge, because of its discriminatory impact upon those artists—sculptors, actors, motion picture producers and directors—whose work necessarily occurs in three dimensions.

1338, 101st Cong., 1st Sess. (1989)), unlike the House bill (H.R. 2978, 101st Cong., 1st Sess. (1989)) ultimately considered by the Senate, proposed no amendment of Section 700's prior expansive definition of "flag of the United States,"⁹ which included pictures and representations of flags.¹⁰ Thus, the Senate Report provides an artist no guidance about the meaning of "flag of the United States."

The House Report, though purporting to address the definition of "flag," does not resolve the artist's dilemma. While asserting that the statute does not reach "a disposable paper cup or napkin with a flag printed on it," "depictions such as *photographs of flags on magazine covers* or products with flags printed on them," "a cake in the shape of a flag," and "flag designs on clothing, *artistic renditions of flags in publications*, and commercial and *political uses of the flag*,"¹¹ its explanation for these exceptions is perplexing. The House Report first categorizes these examples as "decorative representations"—never explaining how the examples in the passages italicized above could be described as "decorative." *Id.* Then, declaring that these examples are "not actual flags in that they are not commonly displayed as flags and have other uses," it summarily concludes that Section 700 avoids any definitional problems.¹² *Id.* at 11-12.

⁹ See S. REP. No. 152, 101st Cong., 1st Sess. 16 (1989), *reprinted in* 1989 U.S. Code Cong. & Admin. News 610, 625 ("S. REP."). The Senate took up the bill that the House had already passed and amended it. 135 CONG. REC. S12,573 (daily ed. Oct. 4, 1989) (Sen. Biden); *id.* at S12,601 (Sen. Biden); S12,607-08 (Sen. Dole); S12,616 (Sen. Wilson); *id.* at S12,654-55 (daily ed. Oct. 5, 1989).

¹⁰ One of Senator Metzenbaum's minority views of the statute assumes that the definition encompasses depictions of the flag. S. REP., *supra*, at 20.

¹¹ H.R. REP. No. 231, 101st Cong., 1st Sess. 11 (1989) (emphases added) ("H.R. REP.").

¹² Valarie Goguen failed to convince the Massachusetts Supreme Judicial Court that the flag sewn to the seat of his pants was not a "flag of the United States." *Goguen*, 415 U.S. at 579 n.24, 570 n.3. We assume that Con-

This baffling explanation, which avoids any reference to artistic work not in publications, provides no meaningful criteria for determining whether artistic work is encompassed by the statute and is thus incompatible with due process. Even if an artist or policeman knew of this legislative history, it is unlikely that it would relieve either of the need to guess at what Congress intended,¹³ especially where the face of the statute gives no hint of such intent.

B. Section 700's Conduct Words Are Also Vague

Section 700(a)(1) proscribes conduct in terms that are also too vague to survive due process scrutiny. Consider, for example, the definitions of "trample": "to tread heavily so as to bruise, crush or injure; to inflict injury or destruction; to press down in walking; to extinguish by stamping with the feet." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2425 (1981) ("WEBSTER'S"). Could one who tip-toes across or stands stocking-footed on the flag safely conclude that he has not trampled it?¹⁴

gress is not trying to make a distinction between "flag designs on clothing" and miniature flags sewn onto clothing. *But see Hoffman v. United States*, 445 F.2d 226, 229 n.9 (D.D.C. 1971) (noting that Hoffman's flag shirt was not a flag and observing that when injury is to a simulated design, proof of violation must be clearer); *id.* at 230 (MacKinnon, J., concurring) (rejecting the idea that Congress intended to criminalize putting a political button on a "shirt resembling a flag").

13 Moreover, the legislative history raises even further problems about what is a flag. The rationale of the House and Senate for why there is no objection to burning a worn or soiled flag is that it is "no longer a fitting emblem for display." S. REP., *supra*, 4 n.2; H.R. REP., *supra*, at 9. This may mean that a worn or soiled flag is not a "flag of the United States." Yet no one would deny that, despite its condition, the worn and tattered remnants of Ft. McHenry's Star Spangled Banner displayed in the Smithsonian Institution is a flag. Unfortunately, neither the Senate nor House Report provides wear or soil guidelines so that artists can determine at what point a flag is not a flag and may be used as a part of artistic expression without fear of prosecution.

14 See *People v. Meyers*, 23 Ill. App. 3d 1044, 321 N.E.2d 142, 143 (1974) (holding that stepping is not "trampling" as proscribed in state flag desecration statute).

(footnote continued)

"Deface" involves another semantic problem. It means "to destroy or mar the face or external appearance of" something. WEBSTER'S at 590. Depending on the subjective meaning of "mar," this definition could reach any artistic work that varied the appearance of the flag, such as using a skull and crossbones instead of stars or the word "nigger" instead of stripes (*Johnson/Artists' Brief App.* 12a, 15a), or that superimposed images on the flag (*Johnson/Artists' Brief App.* 18a). See 135 CONG. REC. S12,618 (daily ed. Oct. 4, 1989) (Sen. Biden). Yet among vexillologists, the term "defaced" refers, with no pejorative sense, to "a flag which has had a special emblem added."¹⁵ Thus, the statute introduces confusion by criminalizing an accepted practice involving flags.

"Mutilate" means "to cut off or permanently destroy a limb or essential part of; to cut up or alter radically so as to make imperfect." WEBSTER'S at 1493. Is a flag mutilated if, instead of cutting off a piece of it, an artist draws or paints a flag but omits a portion of it? Or is that depiction just not a flag? It is also difficult to reconcile "mutilate" with the definition of "flag" which includes "any part thereof."

Another textual quagmire is "physically defile." Its meanings include "to corrupt the purity or perfection of; to make ceremonially unclean; to tarnish, dishonor." WEBSTER'S at 592. Assuming that "physically" is meant to distinguish verbal abuse of the flag (see 135 CONG. REC. S12,616 (daily ed. Oct. 4, 1989) (Sen. Wilson)), the statute nevertheless

In 1989, appellee Scott Tyler exhibited at the School of the Art Institute in Chicago an installation entitled *What is the Proper Way to Display a U.S. Flag?*. The installation invited viewers to write their thoughts in books that were part of the installation. Because there was a flag in front of the books, some people unavoidably stepped onto it in order to record their responses. One such viewer was charged under the state flag desecration statute that proscribed "trampling," but the state finally declined to prosecute. *People v. Susan S. Willhoft*, 89-CR 10527 (Cook County Cir. Ct., Crim. Div., Nov. 29, 1989).

15 WHITNEY SMITH, *THE FLAG BOOK OF THE UNITED STATES* 294 (1975 rev.) ("SMITH").

embraces expression, including artistic expression, that could be interpreted as dishonoring the flag.¹⁶ A word whose meaning depends on the interpretation of "dishonor" is too subjective and vague, and thus violates due process. *Boos v. Barry*, 485 U.S. 312, 322 (1988); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988).

The language of the flag desecration statute is too vague to permit artists to determine whether their expression is proscribed. The enforcement of the statute is therefore left to the personal interpretation of the police, judges, and juries, a result repugnant to the due process guarantees of the Fifth Amendment.

II

THE FLAG DESECRATION STATUTE IS OVERBROAD AND VIOLATES THE FIRST AMENDMENT

A. Section 700's Overbreadth Reaches Protected Artistic Expression

Although the government and its supporting *amici curiae* resolutely ignore all of Section 700 except its prohibition against burning flags, which they assume are always cloth banners, artists confronting this statute cannot ignore any part of the statute. Section 700 is overbroad because it sweeps into its orbit a substantial quantity of artistic activity protected by the First Amendment.¹⁷ *Boos*, 485 U.S. at 329. Furthermore, even if the Court determines that Section 700 is not overbroad as applied to appellees' conduct, the statute is nevertheless amenable to facial attack because it is "so broad as to reach the protected speech of third parties." *Johnson*,

¹⁶ That could include Jasper Johns's poster *Moratorium* (*Johnson/Artists' Brief App.* at 11a); or Paul Conrad's *The American Way of Death*, which depicts lines of cocaine being cut on a flag (*id.* at 10a); or a flag painted on a man's face (*id.* at 4a).

¹⁷ In making this assessment, the vagueness of the statute, because it lends itself to a broader statutory reach, "affects overbreadth analysis." *Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 n.6 (1982).

109 S. Ct. at 2555-56 n.2 (Rehnquist, C.J., dissenting), relying upon *New York State Club Assn. v. New York*, 487 U.S. 1, 11 (1988).

No one seriously contests the proposition that an artist's work is "sufficiently imbued with elements of communication to fall within the scope of the First . . . Amendment[]." *Spence v. Washington*, 418 U.S. 405, 409 (1974); see *Winters v. New York*, 333 U.S. 507, 510 (1948) (rejecting suggestion that First Amendment protects only expository and not creative expression); *United States ex rel. Radich v. Criminal Ct. of New York*, 385 F. Supp. 165, 175 (S.D.N.Y. 1974) (flag constructions that art dealer exhibited in gallery were "symbolic conduct of a nature closely akin to pure speech"). Moreover, the Court has long recognized that conduct relating to the use of flags may also be expressive. *Johnson*, 109 S. Ct. at 2539, and cases cited there. And, to the extent that some works of art use the flag to express political views, they fall into the category of "protest art" and follow in an "established artistic tradition."¹⁸

Given its vagueness, the flag desecration statute encompasses a substantial number of artistic creations using or depicting a flag as a means of expression. It would include all works using United States flags in the *Johnson/Artists' Brief*; the constructions at issue in *Radich*, 385 F. Supp. at 168; flag burnings in motion pictures or television movies that recreate political protests (*Born on the Fourth of July*; *Common Ground* (see note 4, *supra*)); and art exhibitions devoted to use of flags, such as the 1970 "The People's Flag Show" at the Judson Memorial church in Manhattan¹⁹ or "Stars and Stripes," organized by the San Francisco chapter of the American Institute of Graphic Arts.²⁰

¹⁸ *People v. Radich*, 26 N.Y.2d 114, 126, 308 N.Y.S.2d 846, 855, 257 N.E.2d 30, 37 (1970) (Fuld, C.J., dissenting), *aff'd by an equally divided Court*, 401 U.S. 531 (1971); *Radich*, 385 F. Supp. at 168-69.

¹⁹ See *Hendricks v. Hogan*, 324 F. Supp. 1277, 1279-80 (S.D.N.Y. 1971); *The Village Voice*, Nov. 19, 1970, at 1, 20-21.

²⁰ See, HINRICHS, *supra* note 4, at Introduction.

Moreover, there is nothing speculative about the *amici*'s concern with the statute's overbreadth and their fear of prosecution for its violation. Artists and their dealers have been prosecuted under flag desecration statutes despite the clearly expressive content of their works.²¹ Indeed, only last year when the work of one of appellees was exhibited in Chicago (see note 14, *supra*), the Art Institute was forced to defend a civil action by veterans organizations that sought to enjoin the entire exhibit until the piece was altered.²²

Because Section 700 reaches a substantial quantity of the protected expression of artists (*New York State Club Assn.*, 487 U.S. at 11), the statute "sweeps too broadly," *Gooding v. Wilson*, 405 U.S. 518, 527 (1972), and is invalid on its face.

B. Section 700 Cannot Survive After *Texas v. Johnson*

As *Johnson* made clear, once it is determined that artistic work using the flag is expressive, as it is, then whether the Court evaluates a statute regulating that artistic work under the more lenient standard of *United States v. O'Brien*, 391 U.S. 367 (1968), or subjects it to the "most exacting scrutiny" depends on whether the statute is related to the suppression of expression. *Johnson*, 109 S. Ct. at 2538 and 2543, quoting *Boos*, 485 U.S. at 321.

21 See, e.g., *Radich*, 26 N.Y.2d at 126, 308 N.Y.S.2d at 855, 257 N.E.2d at 37 (Fuld, C.J., dissenting); *Radich*, 385 F. Supp. at 168; *People v. Keough*, 31 N.Y.2d 281, 338 N.Y.S.2d 618, 290 N.E.2d 819, *rev'g on non-constitutional grounds* 38 A.D.2d 293, 329 N.Y.S.2d 80 (1972); *People v. Hendricks*, Crim. No. B36653 (N.Y. Crim. 1971) (convicting two of the *amici* for organizing the Judson Memorial Church flag show as a demonstration of support for Stephen Radich); *City of Chicago v. Barbara Aubin*, No. 89 CH 8763 (Cook County Cir. Ct., Chancery Div., Mar. 21, 1990) (declaring unconstitutional Chicago's 1989 Desecration of Flags ordinance and permanently enjoining its enforcement).

22 *Veterans of Foreign Wars v. The Art Institute*, No. 89 CH 1642 (Cook County Cir. Ct., Chancery Div. Mar. 3, 1989) (court held disputed work was protected expression under the First Amendment).

1. Section 700 is Content Based

In these cases, the appellant does not speak with one voice. The government apparently concedes that Section 700 is content based because of the stated interest in protecting the symbolism of the flag "as the emblem of this Nation."²³ DOJ Br. at 28-29, quoting S. REP., *supra*, at 3. Senator Biden "generously assum[es]" (Br. 10) and the Senate apparently concurs (Br. 29-30 n.52) that the Flag Protection Act regulates expression, but they nonetheless maintain (Biden Br. 11-19; Senate Br. at 29-30 n.52), that it is a content-neutral means of promoting the legislative purpose of "protect[ing] the physical integrity of the flag" (S. REP., *supra*, at 4).²⁴

However, it is evident from the statute's face and the congressional reports that the statute is intended to criminalize expressive uses of the symbol of the flag that dishonor the flag and what it represents. One need look no further than the face of the statute to see that its scope is not content neutral. See *Green v. Bock Laundry Machine Co.*, 109 S. Ct. 1981, 1994 (1989) (Scalia, J., concurring). Section 700(a)(1) proscribes, *inter alia*, the burning of a flag of the United States. Section 700(a)(2), however, exempts "any conduct consisting of the disposal of a flag when it has become worn or soiled." It is obvious that the provision is meant to except from criminal penalties the hortatory provision of 36 U.S.C.

23 The government also argues (Br. 31-33) that concededly expressive conduct violating Section 700 is not entitled to First Amendment protection because like other "evils," such as child pornography, obscenity, and perjury, it does not contain sufficient incidents of speech to warrant protection. Not only has the Court already repeatedly recognized the communicative nature of expressive conduct (*Johnson*, 109 S. Ct. at 2539 and cases cited there), but we are astounded that the government sees any comparison between the artistic work at issue (see, e.g., note 4, *supra*) and the "evils" it identifies.

24 Senator Biden's argument (Br. 13-16) that protecting "a symbolic object" does not make a statute content based overlooks the particular symbol at issue and the particular statute. Given the diverse meanings of the flag, a statute can hardly be called "neutral" when it forbids certain conduct in order to "recognize[] the diverse and deeply held feelings of the vast majority of citizens for the flag" (H.R. REP. *supra*, at 9 (emphasis added)).

§ 176(k), which recommends burning as a respectful way of disposing of a flag.²⁵ By making an exception for conduct that has been used traditionally to respect or honor the flag, Congress betrays its intent to exempt conduct expressing honor toward the flag,²⁶ but not conduct expressing disrespect or protest. Such a distinction cannot be sustained after *Johnson*.

Moreover, the words chosen to describe the proscribed conduct also reveal that the statute is content based. For example, the statute does not forbid "stepping" on a flag, only "trampling." It does not forbid "cutting off" or "removing" a piece of a flag, only "mutilating" it. The statute's words are "loaded," because they proscribe conduct with verbs that imply the display of disrespect or contempt. As Assistant Attorney General Barr observed, "These verbs were picked for a reason. They are things that people commonly do to show disrespect"²⁷ Congress's choice of such loaded words reveals the statute's intent to restrict certain kinds of expressive conduct. See *Community for Creative Non-Violence v. Watt*, 703 F.2d 586, 623 (D.C. Cir. 1983) (Scalia, J., dissenting) (guarantee of freedom of expression "would not invalidate a law generally prohibiting the extension of limbs from the windows of moving vehicles; it would invalidate a law prohibiting only the extension of clenched fists."), *rev'd*, 468 U.S. 288 (1984).

25 Indeed, the House and Senate Reports use very nearly the verbatim text of 36 U.S.C. § 176(k) to explain that such flag burning is permissible because a worn or soiled flag is "no longer a fitting image for display." S. REP., *supra*, at 4 n.2; H.R. REP., *supra*, at 9. See note 13, *supra*.

26 H.R. REP., *supra*, at 9 (to avoid prosecuting veterans "whom we really don't want to prosecute"); 135 CONG. REC. S12,612 (daily ed. Oct. 4, 1989) (Sen. Simpson: "We must be so careful not to prohibit 'innocent' desecrations of our national symbol.").

27 *Hearings on Measures to Protect the Physical Integrity of the American Flag: Hearings on S. 1338, H.R. 2978, and S.J. Res. 180 Before the Senate Committee on the Judiciary*, 101st Cong., 1st Sess. 116 (1989) (William P. Barr, Assistant Attorney General, Office of Legal Counsel, United States Department of Justice).

Other statutory language demonstrates the statute's intent to suppress expression rather than merely to protect the physical integrity of flags. Despite the government's (DOJ Br. 39 n.32) and Senator Biden's (Br. 13) claims to the contrary, "maintaining a flag on the floor or ground," in no way impairs its physical integrity. This provision criminalizes what was formerly just an informal injunction to display respect for the flag by not permitting it to touch the ground. See 36 U.S.C. § 176(b). Nor is there the slightest doubt why this prohibition appears in the statute. Its proponent, Senator Dole, acted "in response to the exhibit" of appellee Scott Tyler at the Institute of Art in Chicago (*see* n. 14, *supra*), "and in response to the overwhelming public outrage generated by the exhibit." 135 CONG. REC. S12,607 (daily ed. Oct. 4, 1989). Manifestly, this statutory language was intended to suppress protected artistic expression.²⁸

But it is "defile" that administers the coup de grâce to any claim that the statute is content neutral. As demonstrated (*see supra* pp. 13-14), its meaning includes dishonor or disrespect, thereby exposing the statute's link to expression. The House acknowledged that "defile" signifies lack of content neutrality when it omitted "defile" from the prior statute. H.R. REP., *supra*, at 8; *see* Biden Br. 5. However, Senator Wilson reintroduced the prohibition precisely because the statute, without "defile," would not reach "offensive" conduct upon "a symbol of nationhood or of national unity" which did not endanger its physical integrity. 135 CONG. REC. S12,616 (daily ed. Oct. 4, 1989). Senator Wilson's amendment sought to proscribe expressive conduct showing contempt for the flag—*i.e.*, to suppress certain symbolic speech. Indeed, explicitly recognizing that "defile" implicates protected speech, Senator Biden tried to dissuade Senator Wilson from making his amendment. *Id.* at S12,617 ("I do not want to give . . . anyone in the High Court the excuse to

28 This particular language would also affect other artistic works, such as Herblock's *The All-Purpose Cover* (*Johnson/Artists' Brief App.* 19a) and Vito Acconci's *Instant House*, whose four flag-covered walls lie flat on the floor if someone does not occupy the swing-operated pulley that pulls them up (*id.* at 20a).

suggest that we have moved into the realm of speech.'"); see *id.* at S12,603.

If any doubt lingered that the statute on its face relates to expression, the legislative history removes it. Reacting to *Johnson*, Congress immediately sought a way to overturn it. Although claiming to protect the flag regardless of the expression intended by the proscribed conduct, Congress nevertheless disclosed that its true interest was the flag as "that one symbol of the spirit of our democracy."²⁹ S. REP., *supra*, at 5; H.R. REP., *supra*, at 9.

Thus, the statute on its face and its legislative history, corroborated by the floor debate, disclose that the Flag Protection Act is aimed at the suppression of expression, and the claim that the statute is content neutral is a sham. See *Wallace v. Jaffree*, 472 U.S. 38, 75 (1985). (O'Connor, J., concurring). The government's justification for the Flag Protection Act must therefore be subjected to the strictest scrutiny.

²⁹ The extensive and well-attended floor debates show overwhelming evidence of the true intent of Congress. In the course of explaining their views, the Senators left no doubt that the protection of the "physical integrity" of the flag was a pretext for banning conduct that could be used to dishonor or desecrate the flag as a symbol of America and the patriotic feelings that it represents. See e.g., 135 CONG. REC. S12,600 (daily ed. Oct. 4, 1989) (Sen. Gramm: "I cannot imagine a situation in which someone would desecrate the American flag other than to make a political statement about hating America and its great institutions. So I intend to vote for this bill."); *id.* at S12,610-11 (Sen. Reid: "I do believe it is my duty, and the duty of every American, to respect the flag . . . I am proud . . . not only to profess my creed, but to take action in accordance with it."); *id.* at S12,591 (Sen. Gorton: the courts and people "will be able to distinguish between *true desecration*, a true and invalid attack on the flag of the United States, and a red, white and blue, herring prosecuted under this statute.") (emphasis added).

Nor did the Representatives conceal their true reason for endorsing the amendments to the federal flag desecration statute: to punish those who dishonor the flag. See, e.g., 135 CONG. REC. H5511 (daily ed. Sept. 12, 1989) (Rep. Gephardt: the legislation is the "most effective . . . way to ensure that our national symbol is not desecrated."); *id.* at H5514 (Rep. Brennan: "If we allow the flag to be desecrated . . . we permit our national honor to be trampled upon as well."); *id.* at H5511 (Rep. Florio: "Anyone who dishonors the flag is trampling on the values for which the flag stands and should be punished.").

2. No Compelling Interest Justifies Section 700

To satisfy that strict scrutiny, the government must "show that its 'regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.' " *Boos*, 485 U.S. at 321, quoting *Perry Educational Assn. v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). No one disputes that the federal government has an interest in adopting a national flag (4 U.S.C. §§ 1-2), establishing customs for its use (36 U.S.C. §§ 173-178), ensuring that its use is not claimed exclusively by any one entity (15 U.S.C. § 1052(b)), and protecting property interests in government-owned flags. See *Johnson*, 109 S. Ct. at 2647. However, the government advances no compelling reason why these interests justify Section 700's proscriptions.³⁰ *Id.*

The interest advanced by the government, the Senate, and Senator Biden to justify Section 700 is the protection of the physical integrity of United States flags under all circumstances.³¹ Yet no one has explained what possible interest the government has in the physical integrity of every flag—in all its manifestations—in the private possession of the people or why that interest is so compelling that it requires suppression of protected expression.³² Even if particular flags are

³⁰ Moreover, the suggestion that Section 700 can be characterized as a reasonable regulation of the manner of expression (Biden Br. 10-11) ignores the significant fact that "words are not always fungible, and that the suppression of particular words 'run[s] a substantial risk of suppressing ideas in the process.' " *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522, 532 (1987), quoting *Cohen v. California*, 403 U.S. 15, 26 (1971).

³¹ The Speaker and Leadership Group of the House of Representatives have filed a brief arguing (Br. 20) that the Flag Protection Act is required to preserve the flag as an incident of sovereignty and identification among nations. Not only can this interest, which was not even mentioned anywhere in the legislative history, not be advanced as a rationale for this legislation, but nowhere does the House ever explain why that interest justifies restriction of expressive use of the flag.

³² Moreover, "[t]o conclude that the Government may permit designated symbols to be used to communicate only a limited set of messages would be to enter territory having no discernible or defensible boundaries." *Johnson*, 109 S. Ct. at 2546.

destroyed, the nation's interest in the flag as a symbol of the country is not jeopardized, because destruction of any individual manifestation of the flag does not destroy the strong association of the flag as a symbol of America. The government's rhetoric about violence, assault and destruction³³ may stir emotions, but does not supply the compelling justification for interfering with free speech.

Rep. Skaggs asked "What is the governmental interest in protecting the physical integrity of the American flag in all circumstances?" 135 CONG. REC. H5509 (daily ed. Sept. 12, 1989). The closest answer he could find in the House Report and floor debates was the following (H.R. REP., *supra*, at 9):

[The bill] "recognizes the diverse and deeply held feelings of the vast majority of citizens for the flag, and reflects the government's power to honor those sentiments through the protection of a venerated object. . . ."

In other words, as Rep. Skaggs observed, the government's interest was "to honor the sentiments of the vast majority by criminalizing the behavior of the minority who are expressing different sentiments." 135 CONG. REC. H5509 (daily ed. Sept. 12, 1989). The government confirms that this is the intent and effect of Section 700 (DOJ Br. 27, 35), but as the Congressman correctly observed: "that is, and should be, unconstitutional."³⁴ *Id.*

33 See, e.g., "physical, violent assault . . . on shared experiences" (DOJ Br. 23), "inherently destructive nature of flag burning" (*id.* at 24), "the violent assault on shared values" (*id.* at 27), "wanton, physical destruction of the American flag" (*id.* at 35). In addition, the government's characterization of burning a flag as "inherently destructive" (*id.* 24), overlooks the broad range of meanings that could be ascribed to such conduct, such as grief or despair as well as outrage and protest.

34 Similarly unacceptable is the claim (Biden Br. 23-25) that the Court has repeatedly rejected: that expressive use of the flag may be suppressed because the sentiments can be conveyed in some other way. *Johnson*, 109 S. Ct. at 2546 n.11; *Spence* 418 U.S. at 411 n.4; see *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 541 n.10 (1980). In any event, that an idea may be expressed verbally is cold comfort to an artist whose expression is visual.

Not only does the government's rationale not withstand strict scrutiny, but, even if the statute were held to be content neutral, it does not even survive *O'Brien's* more lenient standard of furthering an important or substantial governmental interest.

Nor is there support for the position that the flag should be exempt from the First Amendment. See S. REP., *supra*, at 22 (minority views of Senators Hatch and Grassley); *Johnson*, 109 S. Ct. at 2548 (Rehnquist, C.J., dissenting); *id.* at 2555 (Stevens, J., dissenting). Although this idea is rooted in stirring and sentimental portrayals of the flag in the country's history, such history is incomplete and ignores the role the flag has played to promote political orthodoxy and exclude minorities.

There is no evidence that the Framers took any special interest in the flag except the utilitarian one of identifying the nation, and especially its ships, in the international community.³⁵ It was not until the Civil War that the flag began to be transformed into the nearly religious icon it later became. GUENTER, *supra* note 6, at 49-50, 64. Promoting the flag as a symbol of America really began with the Civil War, which forced Americans to choose between two flags, the Centennial, patriotic societies' increased promotion of the flag, and its enlarged role in the indoctrination of immigrant school children. *Id.* at 73-87, Chapter 5.

At the turn of the Twentieth Century, patriotic and other societies (e.g., Daughters of the American Revolution, Sons of the Revolution, Grand Army of the Republic, Ku Klux Klan) spearheaded a drive for flag desecration legislation, but were unable to persuade Congress to enact it.³⁶ Congress's resistance arose from the dilemma of how to restrict flag use

35 8 Journal of the Continental Congress 1774-1789, at 464 (Ford ed. 1907); GUENTER, *supra* note 6, at 29-30; SMITH, *supra* note 15, at 2.

36 GUENTER, *supra* note 6, at 143. One of the flag uses which particularly sparked the sponsors' ire was advertising. See *Halter v. Nebraska*, 205 U.S. 34 (1907). Indeed, justification for Section 700 is further undermined in view of the government's long acceptance of the flag's extensive and indiscriminate use in commercial advertising and its recognition that such use has not threatened the flag's status as a symbol of America.

without encroaching on practices it wished to preserve—including campaign flags bearing the names and images of candidates.³⁷ Defeated in their attempts to achieve federal flag desecration legislation, the patriotic and other societies turned to the state legislatures. GUENTER, *supra* note 6, at 143-146. Following the First World War, these organizations promoted adoption of the Civilian Flag Code, which was codified by the federal government in 1942, during wartime, as a hortatory code of flag conduct. 36 U.S.C. §§ 171-178. It took the Vietnam War, which divided the country and included anti-war flag burnings, to bring about in 1968 the first federal flag desecration statute.

The legislative struggles reflected attempts by many groups to appropriate the flag as a symbol for a particular viewpoint and to ostracize opponents of that position. This attempted appropriation of the flag as symbol has threatened at times to turn the flag into a fetish or icon and its display into a civil religion.³⁸ Disturbing examples of this behavior were the Know-Nothings, who identified their nativist, anti-immigrant sentiments with the flag,³⁹ and the Ku Klux Klan, which seized upon the flag as a symbol of its racial and religious bigotry (GUENTER, *supra* note 6, at 178-179; MASTAI, *supra* note 4, at 180). Indeed, even the Civilian Flag Code was partly motivated by virulent wartime, anti-foreigner, anti-Communist and anti-Anarchist sentiments.⁴⁰ See also Strom-

37 See Vietnam Moratorium Petition, *supra* note 4, at Exhibits D-J.

38 SMITH, *supra* note 15, at 83; GUENTER, *supra* note 6, at 182-85; see K. Greenawalt, *O'er the Land of the Free: Flag Burning as Speech*, 37 UCLA L. REV. 925, 945-46 (1990) ("Greenawalt"). See also Safire, *supra* note 3 ("Desecration is a word rooted in sacredness. Americans do not consecrate—make holy—our political signs and documents, nor can anyone 'desecrate' them.").

39 GUENTER, *supra* note 6, at 170; MASTAI, *supra*, note 4, at 27; see Vietnam Moratorium Petition, *supra* note 4, at Exhibit D (1844 campaign banner of the Native American Party with words "Native Americans. Beware of Foreign Influence" emblazoned on the U.S. flag).

40 GUENTER, *supra* note 6, at 167-70, 175-77; SMITH, *supra* note 15, at 80. See also S.M. Guenter, *Civil Religion As A Political Tool: Bush, Dukakis, and the Pledge*, 128 THE FLAG BULLETIN 161 (1988); see also S.M.

berg v. California, 283 U.S. 359 (1931) (red flag of Communist Party displayed as symbol of opposition to organized government); *Ex parte Starr*, 263 F. 145 (D. Mont. 1920) (defendant sentenced to hard labor for 10-20 years under Montana sedition law for refusing mob's insistence that he kiss the flag and for speaking "contemptuous" language about the flag: "What is this thing anyway? Nothing but a piece of cotton with a little paint on it and some other marks in the corner there."').⁴¹

To the extent that the Flag Protection Act would convert the flag into an exclusive symbol of what the majority wants to associate with it and ban expressive conduct "that is regarded as evil and profoundly offensive to the majority of people" (*Johnson*, 109 S. Ct. at 2555 (Rehnquist, J., dissenting)), the Act sanctions misuse of the flag to suppress unorthodox views and ostracize the unorthodox, in violation of the First Amendment.⁴² Yet, "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion" *Barnette*, 319 U.S. at 642.

Guenter, *The Hippies and Hardhats: The Struggle for Semiotic Control of the Flag of the United States in the 1960s*, 130 THE FLAG BULLETIN 131 (1989).

41 "Patriotism is the cement that binds the foundation and the superstructure of the state. . . . But when, as here, it descends to fanaticism, it is of the reprehensible quality of the religion that incited the massacre of St. Bartholomew, the tortures of the Inquisition, the fires of Smithfield, the scaffolds of Salem, and is equally cruel and murderous." *Ex parte Starr*, 263 F. at 146.

42 To the extent that a flag desecration statute is a guise for suppressing criticism of the government, it resembles seditious libel and should be similarly rejected. See *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 153-54 (1967); *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). In addition, the government's plea that First Amendment rights should yield to "decency and civility in discourse" (DOJ Br. 37 n.29) would turn the First Amendment on its head by forbidding expression "simply because society finds the idea itself offensive or disagreeable." *Johnson*, 109 S. Ct. at 2544, and cases cited there.

Although the Court is now urged to bow to the pressure of Congress and the President and create an exception for the flag because of its special significance to the majority (DOJ Br. 41; Biden Br. 29), it is the same Court that has before reminded the majority and its elected representatives that "freedom to differ is not limited to things that do not matter much." *Johnson*, 109 S. Ct. at 2545. See *Greenawalt*, *supra* note 38, at 944.

The Court has been vigilant against efforts to censor particular expression, whether specific words (*Cohen v. California*, 403 U.S. 15, 26 (1971)) or symbols (*Tinker v. Des Moines School Dist.*, 393 U.S. 503, 510-11 (1969)). Otherwise, once government punishes the use of particular words or symbols deemed offensive to some, "government might soon seize upon the censorship of particular words [or symbols] as a convenient guise for banning the expression of unpopular views." *Cohen*, 403 U.S. at 26.

Although offered as a means of protecting the flag's physical integrity, Section 700 operates as a "convenient guise" for censoring unpopular views associated with expressive conduct involving the flag. Applied to artists, the statute would ban from their visual vocabulary a symbol "often chosen as much for [its] emotive as [its] cognitive force." *Id.* Protecting the flag's physical integrity is not a legitimate, let alone compelling, legislative interest, and it impermissibly abridges the First Amendment rights of artists.

CONCLUSION

The judgments of the United States District Courts for the District of Columbia and the Western District of Washington should be affirmed.

Respectfully submitted,

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May 1990

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

UNITED STATES OF AMERICA,

Appellant,

—v.—

SHAWN D. EICHMAN, ET AL.,

Appellees.

UNITED STATES OF AMERICA,

Appellant,

—v.—

MARK JOHN HAGGERTY, ET AL.,

Appellees.

ON APPEALS FROM THE UNITED STATES DISTRICT COURTS
FOR THE DISTRICT OF COLUMBIA AND
THE WESTERN DISTRICT OF WASHINGTON

**BRIEF OF THE ASSOCIATION OF ART MUSEUM DIRECTORS, THE
AUTHORS LEAGUE OF AMERICA, INC., ARTICLE 19 INTER-
NATIONAL CENTRE ON CENSORSHIP, BAY AREA COALITION
AGAINST OPERATION "RESCUE," CALIFORNIA ATTORNEYS FOR
CRIMINAL JUSTICE, CHICAGO ARTISTS' COALITION, THE**

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**CHRISTIC INSTITUTE, CLERGY AND LAITY CONCERNED, COMMITTEE FOR ARTISTS' RIGHTS, COMMITTEE OF INTERNS AND RESIDENTS, COMMUNITY FOR CREATIVE NON-VIOLENCE, EMERGENCY COMMITTEE TO STOP THE FLAG AMENDMENT AND LAWS, FELLOWSHIP OF RECONCILIATION, THE FUND FOR FREE EXPRESSION, HUMANISTS OF WASHINGTON, ILLINOIS ARTS ALLIANCE, LAMBDA LEGAL DEFENSE AND EDUCATION FUND, LAWYERS COMMITTEE ON NUCLEAR POLICY, MODERN LANGUAGE ASSOCIATION OF AMERICA, THE NATION INSTITUTE, THE NATIONAL CONFERENCE OF BLACK LAWYERS, THE NATIONAL EMERGENCY CIVIL LIBERTIES COMMITTEE, NATIONAL LAWYERS GUILD, THE NEW YORK CRIMINAL BAR ASSOCIATION, NEW YORK STATE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, PEN AMERICAN CENTER, REFUSE & RESIST, THEATRE COMMUNICATIONS GROUP, THE UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA (UE), WABUN-ININI, ANISHINABE (a/k/a VERNON BELLECOURT) AS A REPRESENTATIVE OF THE AMERICAN INDIAN MOVEMENT, VIETNAM VETERANS AGAINST THE WAR ANTI-IMPERIALIST, WAR RESISTERS LEAGUE, WRITERS GUILD OF AMERICA, EAST, AND WRITERS GUILD OF AMERICA, WEST, AS AMICI CURIAE
IN SUPPORT OF APPELLEES**

QUESTION PRESENTED

Whether the Flag Protection Act of 1989, Pub. L. No. 101-131, § 2(a), 103 Stat. 777, as applied to the expressive burning of a flag during an overtly political demonstration, violates the First Amendment to the United States Constitution.

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INTEREST OF THE *AMICI CURIAE*

This brief is submitted on behalf of thirty-four organizations, which include progressive political and civil rights groups, educational and artistic associations, lawyers' committees and associations, public interest law groups, labor unions and guilds, minority advocacy organizations, religious organizations, a community-based activist center, and an individual representative of the American Indian Movement. These organizations have a combined membership of well over 250,000 Americans.

Many of these organizations regularly engage in symbolic political expression and expression combining conduct and speech. All believe that symbolic speech is an important and proper medium for expressing messages of political and social significance. The American flag, as a preeminent symbol of this nation, is a particularly potent medium for conveying such expression.

The cases on appeal raise important issues concerning the scope of constitutional protection of symbolic expression. These organizations believe that any retreat from this Court's hitherto vigorous enforcement of the First Amendment would seriously impair their efforts to effect political and social change through the exercise of free speech.

This brief is filed pursuant to Rule 37.3 of the Rules of the Court. The parties have consented to its submission in letters filed herewith. Individual descriptions of the *amici* are set forth in the Appendix.

INTRODUCTORY STATEMENT

In *Texas v. Johnson*, 109 S. Ct. 2533 (1989), this Court was asked to decide whether the First Amendment would permit a state to punish those who desecrate the American flag as a form of political expression. The Court definitively concluded that such suppression is impermissible, declining to "create for the flag an exception to the joust of principles

protected by the First Amendment.” *Id.* at 2546. Now, less than one year after *Johnson* was decided, the Government asks the Court to overrule its decision in that case.

Within days after the Court announced its decision in *Johnson*, both houses of Congress passed resolutions expressing disapproval. S. Res. 151, 101st Cong., 1st Sess. (approved June 22, 1989); H.R. Res. 186, 101st Cong., 1st Sess. (approved June 27, 1989). Within weeks, the Judiciary Committees of the Senate and the House convened hearings on possible responses to *Johnson*. See *Statutory and Constitutional Responses to the Supreme Court Decision in Texas v. Johnson: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 101st Cong., 1st Sess. (1989) [hereinafter *House Hearings*]; *Hearings on Measures to Protect the Physical Integrity of the American Flag: Hearings Before the Senate Comm. on the Judiciary*, 101st Cong., 1st Sess. (1989) [hereinafter *Senate Hearings*]. Bills were introduced to amend the existing federal flag-desecration statute, S. 1338, 101st Cong., 1st Sess. (1989); H.R. 2978, 101st Cong., 1st Sess. (1989), and joint resolutions were introduced proposing a constitutional amendment which would empower Congress and the States “to prohibit the physical desecration” of the flag, S.J. Res. 180, 101st Cong., 1st Sess. (1989); H.R.J. Res. 350, 101st Cong., 1st Sess. (1989).

Members of Congress stated repeatedly in hearings and floor debates that the purpose of an amendment, whether statutory or constitutional, was to overturn this Court’s *Johnson* decision. See, e.g., *Senate Hearings* at 2 (“The fact is, as a body, the U.S. Senate wants to see this opinion overturned.”) (statement of Sen. Thurmond); *House Hearings* at 30 (“Our goal is to overturn *Texas v. Johnson*’s Supreme Court decision.”) (statement of Rep. Michel).

Many in Congress were of the view that a constitutional amendment, rather than a statute, was necessary to circumvent *Johnson*. For example, Senator Dole stated, “I have come to the conclusion—regretfully—that a statute, rather

than a constitutional amendment, . . . will simply *not* guarantee the flag’s safety from physical desecration.” *Senate Hearings* at 384 (emphasis in original). The Administration took the same position: “[W]e believe that the only way to ensure protection of the Flag is through a constitutional amendment.” *Id.* at 118 (letter of Atty. Gen. Thornburg). The Attorney General explained, “We think it is plain that even a statute prohibiting all Flag desecration would be unconstitutional under *Texas v. Johnson*.” *Id.*¹ However, the proposal to amend the Constitution was defeated on its first vote in the Senate. 135 Cong. Rec. S13,733 (daily ed. Oct. 19, 1989).

The House and Senate bills, according to committee reports, both had as their purpose the protection of the flag’s “physical integrity.” S. Rep. No. 152, 101st Cong., 1st Sess. 2 (1989) [hereinafter *Senate Report*]; H.R. Rep. No. 231, 101st Cong., 1st Sess. 2 (1989) [hereinafter *House Report*]. The House Report asserted that “[t]his interest is ‘unrelated to the suppression of free expression.’ *United States v. O’Brien*, 391 U.S. 367, 377 (1968).” *House Report* at 2. Nevertheless, the House bill, H.R. 2978, expressly permitted burning and other means of disposing of worn or soiled flags. Moreover, after the bill’s passage in the House, the Senate amended H.R. 2978 to include within its prohibition the maintenance of the flag on the floor or ground (without reference to any threat of physical harm), 135 Cong. Rec. S12,607-08 (daily ed. Oct. 4, 1989), and “physical defilement,” which a proponent of the amendment defined as acts that do not threaten permanent harm to the flag’s physical integrity but do “injur[e] the flag as a symbol of the United States,” *id.* at S12,616 (daily ed. Oct. 4, 1989) (statement of Sen. Wilson). See *id.* at S12,616-19 (daily ed. Oct. 4, 1989).

¹ Former Judge Bork, a proponent of a constitutional amendment and a witness at the Senate hearings, contended that the very convening of the hearings “doomed” any attempt to overturn *Johnson* by statute: “At this very moment, we are making a record that the proposed statute is designed to evade the *Johnson* ruling, and that is enough to guarantee that the statute will be struck down.” *Senate Hearings* at 102.

(introduced); *id.* at S12,654-55 (daily ed. Oct. 5, 1989) (approved).

As amended, H.R. 2978 was passed by both houses of Congress. 135 Cong. Rec. S12,655 (daily ed. Oct. 5, 1989); *id.* at H6997 (daily ed. Oct. 12, 1989). The President declined to sign the bill, but he allowed it to pass into law on October 28, 1989. In doing so he expressed "serious doubts that [the Act] can withstand Supreme Court review," Statement on the Flag Protection Act of 1989, 25 Weekly Comp. Pres. Doc. 1619 (Oct. 26, 1989), as had leaders in the House and Senate, *House Hearings* at 31 (Rep. Michel); *Senate Hearings* at 384 (Sen. Dole).

The Flag Protection Act of 1989, Pub. L. No. 101-131, 103 Stat. 777, was thus enacted as an amendment to the federal flag-desecration statute, 18 U.S.C. § 700.² As amended, the Act provides:

Whoever knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon any flag of the United States shall be fined under this title or imprisoned for not more than one year, or both.

18 U.S.C. § 700(a)(1). It further provides an exception from the Act's prohibition for "any conduct consisting of the disposal of the flag when it has become worn or soiled." *Id.* § 700(a)(2).

Because many members of Congress doubted that the Act could survive a constitutional challenge, the Act itself also provides for direct appeal to this Court "from any interlocutory or final judgment, decree, or order issued by a United States district court ruling upon the constitutionality of subsection (a)," and directs that this Court shall "accept juris-

² Prior to the amendment, the statute provided in part:

Whoever knowingly casts contempt upon any flag of the United States by publicly mutilating, defacing, defiling, burning, or trampling upon it shall be fined not more than \$1,000 or imprisoned for not more than one year, or both.

18 U.S.C. § 700(a) (1988).

diction over the appeal and advance on the docket and expedite to the greatest extent possible." *Id.* § 700(d).

These cases are on appeal from the dismissal of charges under the Flag Protection Act. In each of two cases, the district court determined that the Act is unconstitutional as applied to acts of flag-burning charged by the Government.

SUMMARY OF ARGUMENT

This Court has determined that acts of flag desecration are expressive conduct which implicate the First Amendment, that a law banning such conduct in order to protect the flag as a symbol is directly related to suppressing expression, and that such a law—purporting to protect the flag's symbolic value—cannot withstand this Court's strict scrutiny. *Texas v. Johnson*, 109 S. Ct. 2533, 2539-47 (1989).

In these cases, appellees are being prosecuted for their expression of political dissent through acts of flag-burning, conduct which the Government concedes is expressive. The Flag Protection Act specifically targets dissent involving flag desecration and, as the Government concedes, is thus directly related to suppressing expression. This Court's relatively relaxed, four-part standard of review for content-neutral laws burdening speech is accordingly inapplicable, *cf. United States v. O'Brien*, 391 U.S. 367, 377 (1968), and the Government does not suggest otherwise. Rather, as the Government acknowledged in the courts below, *Johnson* compels the conclusion that the Act is subject to strict scrutiny. Finally, because the purpose of the Act, like that of the Texas statute challenged in *Johnson*, is to protect the flag as a symbol, the Act cannot survive strict scrutiny.

The Government now advances two arguments, both of which fly in the face of the *Johnson* decision. First, it asks the Court to overrule *Johnson's* determination that the First Amendment protects political statements expressed through acts of flag desecration. Second, it asks the Court to overrule *Johnson's* holding that a law purporting to protect the flag as

a symbol by banning its desecration cannot survive strict scrutiny.

These contentions are fundamentally at odds with settled First Amendment principles and should be rejected out of hand. Both depend on one event, the passage of the Flag Protection Act, as the basis for overruling *Johnson*: first, the Act is said to show that disrespect of the flag is expression not worth protecting; second, the Act is said to show that the governmental interest in silencing disrespect for the flag has somehow suddenly become compelling. Both contentions are entirely without merit.

This Court should reaffirm its holding in *Johnson*. The Flag Protection Act takes aim at political dissent in order to advance one symbolic role for the flag. It serves no compelling governmental interest and is anything but narrowly tailored to serve any such interest. The Court should invalidate the Act as applied to appellees' expressive acts, and the district courts' decisions should be affirmed.

ARGUMENT

I. THIS COURT'S RULING IN *TEXAS V. JOHNSON* COMPELS THE CONCLUSION THAT THE FLAG PROTECTION ACT OF 1989 IS UNCONSTITUTIONAL.

A. Appellees' Flag-Burning Constitutes Expressive Conduct Protected by the First Amendment.

As was true in *Johnson*, appellees were arrested for burning the flag during political demonstrations, not for any contemporaneous verbal expression. In determining whether the First Amendment is applicable to their actions, the Court must determine whether appellees' burning of the flag, like *Johnson*'s, constituted expressive conduct. *Texas v. Johnson*, 109 S. Ct. at 2538.

The Court has long recognized that non-verbal activity will be construed as "speech" under the First Amendment when

it is " 'sufficiently imbued with elements of communication.' " *Id.* at 2539 (quoting *Spence v. Washington*, 418 U.S. 405, 409 (1974) (per curiam)). In reviewing specific actions—including flag-burning—for communicative elements sufficient to trigger First Amendment protections, the Court has asked "whether '[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it.' " *Id.* (quoting *Spence v. Washington*, 418 U.S. at 410-11).

Appellees' conduct easily satisfies this constitutional standard, as the Government is compelled to acknowledge. Appellant's Brief at 22. Appellees burned the flag during political protests that occurred in front of federal buildings, classic public fora. Like the *Johnson* flag-burning, which coincided with the convening of the Republican National Convention and was accompanied by the distribution of political leaflets critical of the United States, appellees' flag-burnings were "roughly simultaneous with and concededly triggered by," *Spence v. Washington*, 418 U.S. at 410, a specific political event (the enactment of the Flag Protection Act) and were accompanied by the distribution of literature expressly condemning that event and its implications.

Here, no less than in *Johnson* and *Spence*, "it would have been difficult for the great majority of citizens to miss the drift of [appellees'] point at the time that [they] made it." *Id.* As the district courts found, appellees' actions were "clearly intended to communicate a political message," 89-1434 J.S. App. 5a and appellees "succeeded dramatically in their attempt," 89-1433 J.S. App. 10a. These events—particularly when juxtaposed with the almost identical circumstances surrounding the concededly expressive flag-burning in *Johnson*—lead inexorably to the conclusion that appellees' acts of flag desecration constitute "expression of an idea through activity," *Spence v. Washington*, 418 U.S. at 411, and therefore implicate the First Amendment, *Texas v. Johnson*, 109 S. Ct. at 2540.

B. The Flag Protection Act Is Aimed at Suppressing Free Expression.

In contravention of the constitutional precept that "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content," *Police Dep't v. Mosley*, 408 U.S. 92, 95-96 (1972), the Government now seeks to imprison and fine any person who "knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon any flag of the United States" 18 U.S.C. § 700(a)(1). While the House and Senate Reports characterize the Act's sole aim as protection of the flag's "physical integrity" and thus disavow any intent to suppress expression, *Senate Report* at 2, 10; *House Report* at 2, this Court's precedents instruct otherwise.

Where the government seeks to regulate expressive conduct, constitutional analysis of the regulation begins with the application of the four-part test announced in *United States v. O'Brien*, 391 U.S. 367 (1968):

[A] government regulation [of expressive conduct] is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; *if the governmental interest is unrelated to the suppression of free expression*; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Id. at 377 (emphasis added). A law that satisfies each component of the *O'Brien* calculus is not analyzed as a primary abridgement of expression and thus need not meet the otherwise stringent requirements imposed by the First Amendment. However, the Flag Protection Act fails to meet the standard imposed by *O'Brien*'s third prong because it is directly "related to the suppression of free expression." *O'Brien*'s lenient standard thus is not implicated and the heightened First Amendment scrutiny typically applied to speech-suppressive legislation controls. *Texas v. Johnson*, 109 S. Ct. at 2542.

The Government concedes that the Flag Protection Act is speech-suppressive. Indeed, it agrees that suppression of the message implicit in desecrating the flag is "precisely the purpose of [the Act]." Appellant's Brief at 28-29. The Government has, therefore, abandoned any argument that *O'Brien* controls this case. See Appellant's Brief at 19 n.20.

Amicus Senator Joseph R. Biden, Jr., however, tracking the House and Senate Reports, attempts to distinguish the Act from the provision struck down in *Johnson*, arguing that the Act's proscriptions are not triggered by a flag-burner's particular viewpoint, are content-neutral, and thus must be analyzed under *O'Brien*. He attempts to shore up this argument by comparing the text of the Act to that of the Texas statute invalidated in *Johnson*. Unlike the Texas statute, which outlawed mistreatment of the flag "in a way the actor knows will seriously offend one or more persons likely to observe or discover his action," Tex. Penal Code Ann. § 42.09(b) (1989), the Act does not expressly condition punishment on the effect of flag-desecration on an observer. Senator Biden therefore takes the position that the Act is indifferent to the content of the particular message conveyed by an act of flag-destruction and is nothing more than a valid "time, place, or manner" restriction. See Brief for Senator Biden at 9-19; see also *Senate Report* at 10; *House Report* at 8-9.

Exclusive reliance on this textual distinction as a means of circumventing the Court's holding in *Johnson* ignores the Act's plain language and legislative history and misapprehends this Court's standard for "content-relatedness" as applied in *Johnson*. Because the Act is related to expression, the *O'Brien* test does not apply and the Act is subject to strict scrutiny—a standard it cannot meet.

1. The Language and Legislative History of the Act Plainly Reveal Its Speech-Suppressive Focus.

On its face, the Flag Protection Act is plainly directed at far more than its stated purpose of simply "protect[ing] the physical integrity of American flags," *House Report* at 2, 8; *accord Senate Report* at 2. The Act expressly permits destruction of the physical integrity of worn and soiled flags. 18 U.S.C. § 700(a)(2). On the other hand, the Act prohibits maintenance of a flag on a floor, although such disrespectful treatment often would better preserve the flag's physical integrity than, say, proudly flying it in high winds. *Id.* § 700(a)(1). The Act also punishes "physical defilement" of the flag, which, in contrast to "defacement," means to "injur[e] the flag as a symbol" without threatening its ongoing physical integrity. *Id.*; 135 Cong. Rec. S12,616 (daily ed. Oct. 4, 1989) (statement of Sen. Wilson). Thus, the Act obviously reaches beyond the flag's mere physical integrity to encompass as well the message it conveys.

This speech-suppressive focus is confirmed by the legislative history surrounding the statute's conception and enactment. Prior to the passage of the Act, the Senate and House Judiciary Committees heard extensive testimony from members of Congress and the Administration, and from "a broad range of constitutional scholars, constitutional historians, representatives of veterans' groups and individual veterans" *Senate Report* at 6. Virtually all of the testimony, and indeed the House and Senate Reports themselves, indicate that the Act's proponents were seeking to protect the flag as a symbol, not merely as a physical amalgam of dyes, threads, and cloth.³

³ *Accord Kime v. United States*, 459 U.S. 949, 953 (1982) (Brennan, J., dissenting from denial of certiorari) ("The Government has no esthetic or property interest in protecting a mere aggregation of stripes and stars for its own sake; the only basis for a governmental interest (if any) in protecting the flag is precisely the fact that the flag has substantive meaning as a political symbol."); *Spence v. Washington*, 418 U.S. at 421 (Rehnquist, J., dissenting) ("It is the character, not the cloth, of the flag which the State seeks to protect.").

In discussing the purpose of the Act, the Senate Report states that "the American flag has an historic and intangible value unlike any other symbol . . . [and] has come to be the visible embodiment of our Nation." *Senate Report* at 2. It alternately identifies that symbolic value by reference to the flag as "a proud and courageous symbol of our Nation's precious heritage," *id.* at 2, as representative of "all the rights and freedoms guaranteed under our Constitution," *id.* at 3, and as the "one symbol of the spirit of our democracy," *id.* at 5. Senators Hatch and Grassley made clear, however, in expressing their opposition to the statute, that the primary purpose even of a facially neutral statute was to "protect the flag as a symbol" by prohibiting "expressive conduct that physically desecrates the flag." *Id.* at 24.

The House Report confirms that the statute's aim is to protect the flag as a symbol. It states that the Act "recognizes the diverse and deeply held feelings of the vast majority of citizens for the flag, and reflects the government's power to honor those sentiments. . . ." *House Report* at 9. Quoting Professor Laurence H. Tribe, the Report further describes the law's purpose as "protect[ing] the flag *and what it represents* from needless and wanton destruction." *Id.* at 10 (emphasis added). A number of Congressmen candidly echoed these sentiments, stating that "[t]he Government's reason for passing [a statute which prohibits all flag destruction] would be precisely the same reasons it had for previously prohibiting contemptuous desecration: protection of the symbolic value of the flag." *Id.* at 17 (additional views of Rep. Sensenbrenner, Jr., *et al.*).⁴

⁴ Floor debate in both houses of Congress was similarly revealing. Representative Fish, in pressing his support for the Act, characterized the "implicit purpose" of flag-desecration laws as "patriotic in nature—to preserve the flag as a national symbol," 135 Cong. Rec. H5502 (daily ed. Sept. 12, 1989). Representative Florio, also a supporter of the legislation, analogized the burning of the flag to "trampling on the values for which the flag stands." *Id.* at H5511 (daily ed. Sept. 12, 1989). Senator Hatch, who assailed the proposed statute as unconstitutional and sought instead a constitutional amendment, stated that prohibiting flag-desecration protects "the flag as a symbol,

These statements, from committee reports and floor debates alike, illustrate that Congress's specific objective in passing the Flag Protection Act was to protect the values associated with the flag, not merely the textile embodying those values.

2. This Court's Recent Decisions Require that the Government's Interest in Protecting the Flag as a Symbol Be Regarded as Speech-Suppressive Even if that Symbol Is Deemed Ideologically Neutral.

The language and legislative history of the Act thus show that Congress passed the statute to protect the flag *as a symbol*. This Court's analysis in *Johnson* leaves no doubt that such an objective is " 'directly related to expression in the context of activity' " such as burning the flag amidst a political protest. *Texas v. Johnson*, 109 S. Ct. at 2542 (quoting *Spence v. Washington*, 418 U.S. at 414 n.8). Concerns for the flag's symbolic value, which flag desecration raises, "blossom only when a person's treatment of the flag communicates some message." *Id.*

Thus it was on the basis of the "governmental interest at stake," the flag's symbolic value, *id.* at 2540—independent of any offense to third parties—that the *Johnson* Court held the Texas statute to be related to expression and thus not subject to *O'Brien's* less stringent test. *Id.* at 2542. This analysis applies with equal vitality in the present case and requires that the Flag Protection Act be subjected to this Court's most exacting scrutiny.

Johnson thus compels the conclusion that the Government's interest in the flag as a symbol of nationhood is one aimed at expression. However, even had *Johnson* not been

including against those who would desecrate the flag as part of a political expression," *id.* at S12,579 (daily ed. Oct. 4, 1989), while Senator Roth, a cosponsor of the legislation, stated that "when America's detractors violate our flag . . . they are insulting all who . . . believe so strongly in the values symbolized by the flag [and] they are assaulting those very values," *id.* at S12,584 (daily ed. Oct. 4, 1989).

decided, the same conclusion would flow from application of this Court's settled standard for determining whether a law is directed at suppressing expression, or only incidentally impairs it.

A law is content-based if the harm it seeks to avert arises as a consequence of the communicative content or impact of expression. *See Boos v. Barry*, 485 U.S. 312, 320-21 (1988); L. Tribe, *American Constitutional Law* § 12-3 at 794-804 (2d ed. 1988).⁵ Only when the challenged law "is 'justified without reference to the content of the regulated speech,' " does the law qualify as "content-neutral," or unrelated to the suppression of speech. *Ward v. Rock Against Racism*, 109 S. Ct. 2746, 2754 (1989) (emphasis in original) (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).⁶ "The government's purpose is the controlling con-

⁵ As Justice Scalia has pointed out:

Every proscription of expressive conduct struck down by the Supreme Court was aimed precisely at the communicative effect of the conduct. The only reason to ban the flying of a red flag (*Stromberg*) was the revolutionary sentiment that symbol expressed. . . . The only reason for singling out black armbands for a dress proscription (*Tinker*) was precisely their expressive content, allegedly causing classroom disruption. The only reason to prevent the attachment of symbols to the United States flag (*Spence*) was related to the communicative content of the flag.

Community for Creative Non-Violence v. Watt, 703 F.2d 586, 624-25 (D.C. Cir. 1983) (Scalia, J., dissenting) (footnotes omitted), *rev'd sub nom. Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984); see Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 Harv. L. Rev. 1482, 1497 (1975).

⁶ An example is a municipal regulation restricting sound amplification in a city park. Such a regulation is not aimed at the suppression of speech because the harm sought to be avoided—noise in sedate areas of the park and nearby residential areas—has nothing to do with the content of any message but, rather, with the noise pollution that is an incidental, non-communicative by-product of any message. *Ward v. Rock Against Racism*, 109 S. Ct. at 2754. Similarly, the governmental interest in the smooth administration of the draft, advanced to justify a rule prohibiting the burning of draft cards is unrelated to the sup-

sideration.” *Ward v. Rock Against Racism*, 109 S. Ct. at 2754 (emphasis added).

Here, the Government’s interest in preserving the flag as a symbol is plainly related to the suppression of expression. The harm to that interest which the Flag Protection Act seeks to avert—the weakening of the flag’s symbolic value caused by acts of flag destruction—arises (if at all) only as a result of the message such acts of flag destruction are understood to communicate. Stated differently, the Act is justified only by reference to the affront to the symbol that an act of flag destruction conveys as its message.

Amicus Senator Biden argues that the Government’s interest in the flag’s symbolic value is unrelated to speech because it is advanced in an ideologically neutral manner. This argument is unavailing, for even if the Flag Protection Act could be considered “viewpoint neutral” in the sense that it forbids destruction of flags regardless of the discrete message sought to be conveyed by a particular flag desecrator, it is nevertheless “content-based” in that the Government’s justification for suppression relies precisely upon the fact that acts of flag destruction, because they communicate, impair the flag’s status as a symbol. See *Boos v. Barry*, 485 U.S. at 319-21 (ban on criticism of foreign governments near embassies, although viewpoint-neutral, is content-based because it is justified by reference to the content of speech).⁷

pression of expression because the harm sought to be avoided—an inefficient draft—arises from noncommunicative consequences of draft card destruction and not from the anti-draft message thereby conveyed. *United States v. O’Brien*, 391 U.S. at 381-82.

⁷ Put otherwise, if laws banning flag destruction were not aimed specifically at the capacity of such conduct to communicate, it is difficult to fathom how such laws could protect the flag’s integrity as a symbol. It is true that a particular exemplar of a flag, once destroyed, is no longer available to communicate any message. In that limited sense, an act of flag destruction, even if unwitnessed, would impair the capacity of that particular rectangle of cloth to continue to symbolize this

In short, the Flag Protection Act “targets the direct impact of a particular category of speech, not a secondary feature that happens to be associated with that type of speech,” and it therefore “must be subjected to the most exacting scrutiny.” *Id.* at 321; cf. *Ward v. Rock Against Racism*, 109 S. Ct. at 2754.

3. The Flag Protection Act, Because It Limits Expressive Uses of the Flag to Those that Communicate Messages Approved of by the Government, Is Not Ideologically Neutral.

The Flag Protection Act is content-based, even if it could be regarded as neutral in terms of viewpoint or ideology. But in fact the statute is ideologically biased at the most elementary level.

Our flag, like most potent symbols, may be employed to communicate myriad messages. All such messages, however, relate back in some way to the flag’s central significance as “an emblem of National power and National honor.” *Halter v. Nebraska*, 205 U.S. 34, 42 (1907). The Flag Protection Act quite plainly seeks to protect “National honor” by preventing use of the flag to communicate discordant, “unpatriotic” messages that are inconsistent with the messages most Americans associate with the flag. The Government acknowledges as much. See Appellant’s Brief at 23 (“Flag burning is,

nation. But surely no one is arguing that the Government has an interest in assuring that the precise number of flags available for display throughout the nation remains constant.

The same fallacy is embedded in attempts to analogize the defacement of national monuments such as the Lincoln Memorial. The supply of United States flags is unlimited, but there is only one government-owned, corporeal manifestation of the Lincoln Memorial. An appropriate analog to the Flag Protection Act is therefore a law prohibiting the defacement of postcards and miniature replicas of the Lincoln Memorial, as opposed to the Memorial itself. It hardly needs to be said that a law protecting postcards and replicas would be directed at the unfavorable message conveyed by their defacement, not at preserving the physical integrity of the paper and plastic on which images of the Memorial appeared.

by its nature, a physical, violent assault on the most deeply shared experiences of the American people, including the sacrifices of our fellow citizens in defense of the nation and the preservation of liberty.”); *id.* at 27-28 n.23. Unlike even the viewpoint-neutral restriction on the display of any and all signs critical of foreign governments which the Court found unconstitutional in *Boos v. Barry*, 485 U.S. at 319, the Flag Protection Act takes aim at the use of one symbol—a very particular symbol—to express views that do not meet with the Government’s approval. This ideological bias alone, when used to justify a ban on expressive conduct, necessarily violates the crucial third prong of the *O’Brien* test.

This Court has long recognized the flag’s position as the nation’s central patriotic symbol.⁸ There can be no question that the flag, standing as it does for honor and allegiance to the national government, is a political symbol of ideological force. That the flag as a symbol inspires deep affection, national pride, and mystical reverence renders it more ideological, not less so. The nature of the Government’s interest in the flag is equally ideological. It is precisely because the flag is a symbol affirming faith in the nation that the Government asserts any interest in the flag’s value.

Indeed, the same flag that is flown proudly over the United States Capitol to celebrate the principles embodied in the First Amendment might nevertheless be desecrated on the steps of the Capitol to protest a law violative of those principles. One need not applaud this latter form of expression to agree that the Flag Protection Act seeks nothing less than to reserve the flag’s special symbolic power to express patriotic messages preferred by the Government. Such legislative sort-

⁸ In *Halter v. Nebraska*, 205 U.S. at 41, the Court described the flag as “the emblem of the American Republic . . . [f]or [which] . . . every true American has not simply an appreciation but a deep affection.” The Chief Justice has more recently noted that “[t]he American flag . . . throughout more than 200 years of our history, has come to be the visible symbol embodying our Nation. . . . Millions and millions of Americans regard it with an almost mystical reverence” *Texas v. Johnson*, 109 S. Ct. at 2552 (Rehnquist, C.J., dissenting).

ing among preferred and disapproved messages is the very essence of viewpoint-based regulation. See *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984) (First Amendment forbids regulating expression “in ways that favor some viewpoints or ideas at the expense of others”); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 67 (1976) (plurality opinion) (noting need for “absolute neutrality” by the government when regulating communication).

C. The Act Cannot Withstand Strict Scrutiny Because the Government Has No Compelling Interest in Prescribing One Symbolic Role for the Flag.

We have demonstrated that the Flag Protection Act is, at its core, aimed at the suppression of political expression. The only remaining question is whether the Act is constitutional despite this suppressive focus. In order to be constitutional the Act must survive this Court’s strict scrutiny. We maintain that it does not and that it thus must be invalidated under this Court’s First Amendment jurisprudence.

Once a law is shown to be aimed at the suppression of political expression of the type involved in this case, it must, “as a *content-based* restriction on *political speech* in a *public forum*, . . . be subjected to the most exacting scrutiny.” *Boos v. Barry*, 485 U.S. at 321 (emphasis in original). Under this strict standard, such a law must be invalidated unless it can be shown to be narrowly tailored to serve a compelling governmental interest. *Austin v. Michigan Chamber of Commerce*, 110 S. Ct. 1391, 1396 (1990); *Sable Communications v. FCC*, 109 S. Ct. 2829, 2836 (1989).

Johnson makes clear that laws seeking to protect the flag’s symbolic value by prohibiting flag destruction do not serve a compelling interest under the First Amendment and therefore cannot survive strict scrutiny. *Texas v. Johnson*, 109 S. Ct. at 2542-48. While most Americans obviously find flag desecration repugnant, that alone could never be sufficient to justify the suppression of expression. As the Court recognized, “If there is a bedrock principle underlying the First Amendment,

it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Id.* at 2544. Although the Government "has a legitimate interest in making efforts to 'preserv[e] the national flag as an unalloyed symbol of our country,' " *id.* at 2547 (quoting *Spence v. Washington*, 418 U.S. at 412), that interest has thrice before been rejected as a justification for bald abridgment of expression. *Id.* at 2544-48; *Spence v. Washington*, 418 U.S. at 412-14; *Street v. New York*, 394 U.S. at 593. The Constitution forbids the government from punishing the individual who expresses disrespect for national symbols, *id.*, just as it prohibits the state from forcing individuals "to confess by word or act their faith therein," *Board of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

To hold otherwise would truly invite a reorientation of the government's relationship to the citizenry. "The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating . . . speech." *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring). Through the Flag Protection Act, the Government assumes the role of guardian of the public mind, seeking to insulate the flag as a venerated symbol. However important that aim may be to the Government, the Constitution forbids its invocation as a ground for silencing expression.

Moreover, the Government has failed to make any showing that the flag's status as a symbol is impaired by acts of flag desecration.⁹ Its "almost talismanic reliance on the mere

9 The Government's failure to establish that nexus is a product of its confusion of the *concept* of the United States flag (*i.e.*, a design composed of fifty white stars on a blue background and thirteen red and white stripes) with discrete *physical renderings* of that concept. When we say the flag symbolizes nationhood, we recognize a long-standing association in the public mind between the design described above and this nation. But the symbolic equation of flag and country is not destroyed (or even threatened) by the destruction of an individual reproduction of that design. To revisit the example of a law banning defacement of a postcard of the Lincoln Memorial, *see note 7 supra*,

assertion of" such impairment, *Riley v. National Fed'n of the Blind*, 487 U.S. 781, ___, 108 S. Ct. 2667, 2674 (1988), cannot substitute for a demonstration of the actual nexus between asserted harm and regulated act which this Court demands. *See, e.g., Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 633-34 (1980).¹⁰

The Government, of course, through persuasion and example, can and does foster sentiments of national pride and unity. *Texas v. Johnson*, 109 S. Ct. at 2547. It may, for example, promote the flag by enacting precatory regulations regarding its proper treatment, *e.g.*, 36 U.S.C. §§ 173-177, by flying it on public grounds, by encouraging citizens to fly it at home, by schooling children in its history, and by setting apart a regular day for its observance. *See Wooley v. Maynard*, 430 U.S. 705, 717 (1977) (noting that New Hampshire may disseminate ideology of state pride "in any number of" non-abridging ways); *Linmark Assocs. v. Township of Wilkesboro*, 431 U.S. 85, 97 (1977) (suggesting the less speech-restrictive alternatives of government-sponsored publicity and education). As Justice Brandeis wisely counseled in *Whitney v. California*, 274 U.S. 357, 377 (1920) (concurring opinion): "If there be time to . . . avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."

The Government has adduced no evidence at all that the flag's symbolic capacity is endangered in the least by acts of flag desecration. Thus, even assuming that the Government did have a compelling interest in silencing those who would threaten the flag as a symbol, it has not made the slenderest of a showing that the Flag Protection Act is tailored to achieving that end. Indeed, the Government can only argue

such defacement no more impairs the meaning and value of the Memorial than does the desecration of a particular cloth or paper rendering of the flag impair our flag's power to symbolize this nation.

10 In fact, it seems more plausible that flag desecration reinforces in the public mind the connection between the flag as a physical object and its symbolic status.

that the Act does not impose an absolute ban on all forms of expressive conduct involving the flag. Appellant's Brief at 45. Thus, it effectively abandons any effort to meet this Court's strict scrutiny standard—a showing that the Act is not simply less than absolute in scope, but “narrowly tailored” to serve a compelling governmental interest. *Cf. Austin v. Michigan Chamber of Commerce*, 110 S. Ct. at 1398 (finding campaign financing regulation “precisely targeted” to achieve compelling state interest).¹¹

II. THE GOVERNMENT'S SUGGESTION THAT *TEXAS V. JOHNSON* SHOULD BE OVERRULED IS WITHOUT MERIT.

A. There Is No Basis for Overruling *Johnson*'s Determination that Acts of Disrespect for the Flag Constitute Protected Expression.

Having recognized that the Flag Protection Act should not be analyzed under the less stringent *O'Brien* standard, the Government proceeds to argue that the Act should not be scrutinized at all insofar as it regulates acts of flag desecration (as distinguished from other forms of expression that might accompany such acts). Although the Government continues to assert that it can meet this Court's strict scrutiny standard—an assertion that we address in Part II.B *infra*—it also seeks to take these cases entirely outside the ambit of the First Amendment. This remarkable argument—which depends on the premise that “physical destruction of a flag of the United States falls outside the scope of protected expressive conduct under the First Amendment”—seeks noth-

¹¹ We do not mean to suggest that a constitutionally valid flag-desecration statute could never be written. A statute prohibiting the desecration of the flag in a manner clearly “‘directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action,’” *Texas v. Johnson*, 109 S. Ct. at 2542 (quoting *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969)) would be perfectly consistent with this Court's holdings in *Johnson*, as well as with *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572-73 (1942), and *Brandenburg v. Ohio*, 395 U.S. at 448-49, and would presumably survive a constitutional challenge.

ing less than to reverse *Johnson* by fashioning a new category of unprotected speech. Appellant's Brief at 28; *see id.* at 24-25, 34 n.27, 40, 42-44.

1. The Flag Protection Act Cannot Be Salvaged by Appeal to Unprotected Speech.

Much about the nature of the conduct at issue is not in dispute. The Government concedes that appellees' flag-burning constitutes expressive conduct that occurred in public fora as “part of organized political demonstrations—protests aimed at any number of current social and political issues.” Appellant's Brief at 28. Nor is there any dispute that the Flag Protection Act is content-based. Appellant's Brief at 27-28 & n.23.

In the face of these inevitable concessions, the Government now takes the position that appellees' political expression is altogether outside the scope of the First Amendment. Appellant's Brief at 28. It seeks support for its tour de force from this Court's decisions identifying discrete categories of speech that are not entitled to absolute protection under all circumstances. Appellant's Brief at 30-32 (citing, for example, *New York v. Ferber*, 458 U.S. 747 (1982) (child pornography); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (incitement of imminent lawless action); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (fighting words)).

The Government does not contend that appellees' expressive conduct falls into any of these existing categories.¹² Rather it attempts to draw a common rationale from these decisions and from commercial and labor relations precedents, *see note 13 infra*. The Government proposes a new three-part balancing test, by which it would withdraw First Amendment protections for a given class of expression whenever:

¹² This Court's opinion in *Johnson* effectively precludes such an argument by rejecting the applicability of the two conceivably relevant classes of speech, incitement of imminent lawless action and fighting words. *Texas v. Johnson*, 109 S. Ct. at 2542 (citing *Brandenburg v. Ohio*, 395 U.S. 444; *Chaplinsky v. New Hampshire*, 315 U.S. 568).

(1) the speech (or expressive conduct) is narrowly and precisely defined, (2) whatever value the expression may have to the speaker (or others) is outweighed by its demonstrable destructive effect on society as a whole or on particular overreaching social policies, . . . and (3) the speaker has suitable alternative means to express (and others have means to receive) whatever protected expression may be part of the intended message

Appellant's Brief at 33 (citations omitted).

2. The Government's Proposed Test for Determining Whether Speech Is Entitled to First Amendment Protection Is Unsupportable.

Settled First Amendment doctrine demonstrates how far afield the Government's proposed standard would take us.¹³ To begin with, the Government would weigh the value of the regulated expression to the individual against its cost to society (although the manner of doing so remains unclear). As this Court has noted more than once, however, it is inappropriate for judges to attempt to weigh the "importance" of ideas before subjecting laws concerned with regulating speech to strict scrutiny. See *Employment Div. v. Smith*, 58 U.S.L.W. 4433, 4437 (U.S. Apr. 17, 1990). "The constitutional protection does not turn upon 'the truth, popularity,

¹³ Notwithstanding the assurance that its approach is not unprecedented, Appellant's Brief at 32, the decisions on which the Government principally relies for its proposed test involve commercial and other nonpolitical speech. Yet it purports to assess expression that is profoundly and undeniably political. Cf. *Texas v. Johnson*, 109 S. Ct. at 2543. Whereas political expression enjoys a "special status," situated as it is "at the core of the First Amendment," commercial speech is less rigorously protected. *Shapiro v. Kentucky Bar Ass'n*, 486 U.S. 466, 483 (1988) (O'Connor, J., dissenting). The very cases that the Government cites make this distinction quite plain. See, e.g., *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 562-63, 564 n.6 (1980) ("The Constitution . . . accords a lesser protection to commercial speech than to other constitutionally guaranteed expression."); *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617-18 (1969) (distinguishing employer expression in the labor relations setting from expression in a political context).

or social utility of the ideas and beliefs which are offered,' " *New York Times Co. v. Sullivan*, 376 U.S. 254, 271 (1964) (quoting *NAACP v. Button*, 371 U.S. 415, 445 (1963)), nor should it be limited in order to accommodate the majority's "dislike of a particular expression," *Hustler Magazine v. Falwell*, 485 U.S. 46, 55 (1988).

The Government's further innovation, a proposal that speech be made subject to regulation when "suitable alternative means" of expression are available, was specifically addressed and rejected by this Court in *Johnson*, just as it was "'rejected summarily'" in *Spence*. *Texas v. Johnson*, 109 S. Ct. at 2546 n.11 (quoting *Spence v. Washington*, 418 U.S. at 411 n.4). These holdings were hardly novel. The Court has "consistently rejected the suggestion that a government may justify a content-based prohibition by showing that speakers have alternative means of expression." *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 541 n.10 (1980); see *Schneider v. State*, 308 U.S. 147, 163 (1939).

The Government nevertheless implies that the recent holding in *Austin v. Michigan Chamber of Commerce*, 110 S. Ct. 1391, is somehow inconsistent with these precedents, because the *Austin* Court sustained a campaign financing regulation that did not "'impose an absolute ban on all forms of political spending but permit[ted] corporations to make independent political expenditures through separate segregated funds.'" Appellant's Brief at 34 n.27 (quoting *Austin v. Michigan Chamber of Commerce*, 110 S. Ct. at 1398). In fact, the only inconsistency lies in the Government's proposal to test categories of expression generally with a standard properly applied to laws demonstrably supported by a compelling state interest. In particular, the Court in *Austin* identified a compelling interest—the prevention of actual or apparent corruption in the electoral process—and only then inquired whether the regulation was "sufficiently narrowly tailored," concluding that it was "precisely targeted to eliminate the distortion caused by corporate spending." 110 S. Ct. at 1398; accord *Sable Communications v. FCC*, 109 S. Ct. at 2836. In contrast, the Government's "alternative means anal-

ysis" on its face would apply to *any* discrete class of speech deemed socially unimportant. See Appellant's Brief at 33 & n.27.

These fundamental conceptual errors are compounded when the Government attempts to apply its test to appellees' acts of political protest. The Government never specifically explains how expression regulated by the Flag Protection Act is "narrowly and precisely defined" in accordance with the first prong of its three-part test. Instead, it submits in passing that "appellees' own conduct shows" that the Act is not vague. Appellant's Brief at 39 n.32. This contention is itself vague; surely the Government does not mean to argue that appellees must have been aware of the scope of the Act because they have been charged with violating it.¹⁴

Next, the Government seeks to weigh appellees' "expressive interests" against harm which it believes their expression will engender. It concludes, on the one hand, that appellees' expression "is 'no essential part of any exposition of ideas, and [is] of . . . slight social value as a step to truth,' " *id.* at 45 (quoting *Chaplinsky v. New Hampshire*, 315 U.S. at 572) (Government's emphasis omitted), and, on the other hand, that the expression "goes beyond that level of decency, civility, and respect in discourse which merits constitutional protection," *id.* at 37 n.29.

We suggest that this Court's precedents compel a contrary conclusion. However strongly the Government may disagree with the symbolic message of appellees' flag-burning, it is a "bedrock principle" that the Government is without author-

¹⁴ In fact, the Act is neither precise nor narrow. It is unclear, for example, whether some, most, or all expressive conduct involving disrespect for the flag would violate the Act by "physically defil[ing]" the flag. No doubt the superimposition of a peace symbol made of black tape would physically defile the flag. See *Spence v. Washington*, 418 U.S. at 420-21 (Rehnquist, J., dissenting). So too would the sewing of a flag into the seat of one's pants. See *Smith v. Goguen*, 415 U.S. 566, 591 (1974) (Blackmun, J., dissenting). In the final analysis, it is difficult to imagine disrespectful conduct in any way relating to the flag in which a citizen could engage without fear of prosecution for physically defiling the flag, because "conduct" is by definition physical.

ity to write off such expression as wanting in social value and then to prohibit it. *Texas v. Johnson*, 109 S. Ct. at 2544. Even if an inquiry into the social value of expression were permissible, *but see Employment Div. v. Smith*, 58 U.S.L.W. at 4437, the Government is simply wrong in its conclusion that flag-burning as an act of political protest has no significance in the pursuit of truth. One need only recall, for example, that the current "national consensus" of pride and respect for the American flag to which the Government so often refers, *e.g.*, Appellant's Brief at 22, followed in the wake of an unknown man's act of flag-burning which was prosecuted in *Johnson*. The nation's response bears out this Court's prediction that "the flag's deservedly cherished place in our community will be strengthened, not weakened, by our holding today." *Texas v. Johnson*, 109 S. Ct. at 2547. In Justice Jackson's enduring words, "[t]o believe that patriotism will not flourish" unless expression of dissent through the flag is stamped out "is to make an unflattering estimate of the appeal of our institutions to free minds." *Board of Educ. v. Barnette*, 319 U.S. 624, 641 (1943).

The Government also falls into error when it argues that appellees' political expression does not merit constitutional protection because it constitutes an assault on "basic human dignity" and it "goes beyond [a certain] level of decency, civility, and respect in discourse." Appellant's Brief at 37 & n.29. In the Government's view, "[t]hat is what *Chaplinsky* and the defamation cases are, at bottom, all about." *Id.*

That is not, we submit, what the First Amendment is all about. The imperative that "Congress shall make no law . . . abridging the freedom of speech," U.S. Const. amend. I, does not have, as its primary concern, the fostering of courtesy and endearment. On the contrary, "so long as the means are peaceful, the communication need not meet standards of acceptability." *Cohen v. California*, 403 U.S. 15, 25 (1971) (quotation marks and citation omitted). The First Amendment's protection encompasses the indecent, *Sable Communications v. FCC*, 109 S. Ct. at 2836, and extends to "vehement, caustic, and sometimes unpleasantly sharp

attacks.' " *Hustler Magazine v. Falwell*, 485 U.S. at 51 (quoting *New York Times Co. v. Sullivan*, 376 U.S. at 270). Notwithstanding the Government's urging to the contrary, see Appellant's Brief at 37, the First Amendment protects affronts to dignity, even in so potentially tense a setting as that of foreign diplomatic relations. *Boos v. Barry*, 485 U.S. at 321-24. The First Amendment requires toleration of offensive expression and even of affronts to dignity because a contrary rule would impinge on individual dignity at a more fundamental level—a level at which we, as participants in an "arena of public discussion," are free to choose what will be expressed. *Cohen v. California*, 403 U.S. at 24.¹⁵

Finally, the Government asserts that "Congress has left entirely in place abundant opportunities . . . [for] expressive conduct involving the flag," rather than imposing an absolute ban. Appellant's Brief at 45. The Government does not provide examples of the conduct that, in its view, falls outside the scope of the Act's prohibition.¹⁶

¹⁵ We have found no more eloquent a statement of these founding principles than that of Justice Brandeis:

Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.

Whitney v. California, 274 U.S. at 375 (Brandeis, J., concurring) (footnote omitted).

¹⁶ As we have explained, there may well be no conduct at all involving disrespect for the flag that does not constitute at least a physical defilement for purposes of the Act; conduct is intrinsically physical. As a

That alternative channels for expression of disrespect remain open, assuming that they do, is simply immaterial. The Court has emphasized that the First Amendment's protection "is not dependent on the particular mode in which one chooses to express an idea." *Texas v. Johnson*, 109 S. Ct. at 2546. The reasoning underlying this well-established rule is simple: Although a narrowly drawn regulation may be permissible if it is unrelated to expression, a regulation such as the Act which is directed at expression cannot be salvaged merely on the ground that it is narrow. See *Ward v. Rock Against Racism*, 109 S. Ct. at 2758 (narrowly tailored regulation may be upheld "only if each activity within the proscription's scope is an appropriately targeted evil" (quoting *Frisby v. Schultz*, 487 U.S. 474, 485 (1988))).

We do not mean to suggest, of course, that the Act's absolute ban on expressive conduct is "narrow." Our point is that appellees' acts of flag-burning were indeed constitutionally protected expression. *Texas v. Johnson*, 109 S. Ct. at 2540. The Government could not take refuge behind the notion—even if it were true—that it is only banning a little bit of speech.

B. There Is No Basis for Overruling *Johnson's* Holding that a Ban on Acts of Disrespect for the Flag Fails Strict Scrutiny.

The Government grudgingly acknowledges that flag-burning implicates the First Amendment, and asks this Court to reconsider that central teaching of *Texas v. Johnson*, 109 S. Ct. at 2540. Appellant's Brief at 42. It cites a single, intervening development in support of its request for reconsideration, namely, the passage of the Flag Protection Act. It then points out that this Court customarily pays deference to legislative judgments, particularly where Congress itself considered the question whether its act is constitutional. Appellant's

factual matter, then, it would appear that the Government is incorrect in asserting that the Act does not absolutely ban expressive conduct involving the flag, Appellant's Brief at 45.

Brief at 21, 26-27 (citing *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981)). The Government contends that a "national consensus"¹⁷ underlies the Flag Protection Act, a consensus reflecting a "compelling governmental interest in protecting the flag." Appellant's Brief at 27 & n.23. Noting that the *Johnson* Court arrived at its constitutional interpretation "without having the benefit of" this "legislative determination," the Government concludes that this Court should reconsider—and overrule—*Johnson* out of deference to Congress's determination. *Id.* at 44.

The implications of this bold assertion, if carried through, would fundamentally alter our system of government. The Government's argument apparently would require that the Court defer to Congress's judgment that its legislation is constitutional whenever (and indeed by virtue of the fact that) the law had won majority votes in both houses of Congress and had not been vetoed by the President. Moreover, to the extent that this Court's prior decisions conflicted with Congress's newly announced judgment, the Court would overrule them. The Constitution under such a theory would become nothing more than precatory language for Congress to consider. It is unclear what role this Court would have in such a system of constitutional adjudication beyond that of nullifying precedents inconsistent with Congress's current actions.

What is clear is that this is not our system of government. Former Judge Bork put the matter succinctly when he testi-

¹⁷ It cannot be argued that the putative "national consensus" reflects anything but a desire by Congress and the President to protect the flag. Specifically, there is no agreement among Congress and the President that the Flag Protection Act is constitutional. Congress so expected constitutional challenges that it provided for this Court's direct, expedited review of such challenges within the Act itself. 18 U.S.C. § 700(d). The President so doubted the Act's constitutionality that he declined to sign it. 25 Weekly Comp. Pres. Doc. at 1619-20. In fact, the Government concedes that, as each of the courts below determined, Congress failed in its effort to draft a content-neutral law. Appellant's Brief at 27-28 n.23. Thus, the Government would have this Court defer to Congress's judgment that the Act is constitutional, but would have it ignore Congress's reasoning. See *id.*

fied at the Senate hearings, "If Chief Justice Marshall's 1803 decision in *Marbury v. Madison* [5 U.S. (1 Cranch.) 137] means anything, it means you may not overturn a decision like [*Johnson*] by statute." *Senate Hearings* at 100. The individual liberty at stake in these cases is simply not a value that, under the Constitution, may be left to ebb and flow with the political tide of majoritarian sentiments:

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

Board of Educ. v. Barnette, 319 U.S. at 638.

Moreover, contrary to the Government's view, the passage of the Flag Protection Act adds nothing whatsoever to this Court's constitutional inquiry. Evidence of the governmental interest in protecting the flag was hardly "[a]bsent from the backdrop of *Texas v. Johnson*," Appellant's Brief at 27. The federal government as well as 48 of the 50 States had adopted flag desecration statutes, most of which have been in force through the greater part of this century. *Texas v. Johnson*, 109 S. Ct. at 2551-52 & n.1 (Rehnquist, C.J., dissenting). If the Flag Protection Act can be said to have introduced anything new to the constitutional debate, it might be the fresh fervor and passion with which acts of flag desecration, long outlawed, continue to be so; but this does not transform the Government's interest into a "compelling" one in any legal sense.

In fact, there is no legislative determination that would justify the short-circuiting of judicial review. As the Government acknowledges, Appellant's Brief at 26, it is this Court's "task in the end to decide whether Congress has violated the Constitution. This is particularly true where the legislature

has concluded that its product does not violate the First Amendment." *Sable Communications v. FCC*, 109 S. Ct. at 2838.

Justice Kennedy's succinct statement in *Johnson* equally applies to these cases: "[W]e are presented with a clear and simple statute to be judged against a pure command of the Constitution. The outcome can be laid at no door but ours." *Texas v. Johnson*, 109 S. Ct. at 2548 (Kennedy, J., concurring). For if the outcome is laid elsewhere, in Chief Justice Marshall's words, "the constitution itself becomes a solemn mockery." *United States v. Peters*, 9 U.S. (5 Cranch.) 115, 136 (1809).

CONCLUSION

For the reasons set forth above, the orders of the district courts dismissing the charges against appellees should be affirmed.

Dated: New York, New York
May 3, 1990

Respectfully submitted,

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APPENDIX

Descriptions of Amici

The Association of Art Museum Directors (AAMD) is a national organization representing 150 directors of America's largest art museums. The AAMD believes in the protection of free expression and opposes any intent to undermine the First Amendment to the U.S. Constitution.

The Authors League of America, Inc. is a major national society of professional writers, representing the more than 14,500 author, dramatist, and journalist members of The Dramatists Guild, Inc. and The Authors Guild, Inc. One of the League's principal purposes is to express its members' views in cases involving fundamental questions of freedom of expression and to support that constitutional right.

ARTICLE 19 International Centre on Censorship, an international human rights organization based in London, was established in 1986 to defend the rights set out in Article 19 of the Universal Declaration of Human Rights including the right to seek, receive and impart information and ideas. ARTICLE 19 views the Flag Protection Act of 1989 as a retrenchment from free expression principles enshrined in United States law and tradition, and as unnecessary to "meet[] the just requirements of morality, public order and the general welfare" (under Article 29 of the Universal Declaration of Human Rights) in a democracy such as the United States.

The Bay Area Coalition Against Operation "Rescue" ("BACAOR") is a coalition of groups and individuals who are committed to defending women's rights and women's access to abortion services by keeping the clinics open during attempted Operation "Rescue" blockades, and by joining a national grassroots network of reproductive health care for all women. BACAOR has a vital interest in its freedom to carry out political work on controversial public issues, including direct and symbolic speech, without interference from the government.

California Attorneys for Criminal Justice (CACJ) is a statewide organization of approximately 2,200 attorneys whose practices emphasize the defense of individuals accused of crime. Since its founding CACJ and its members have been active in defending the First Amendment rights of individuals to free expression and free speech.

The Chicago Artists' Coalition is a non-profit service organization for visual artists with a membership of nearly 2,200 visual artists in the Chicago metropolitan area and nearly 1,000 more artists nationwide. The Coalition was founded in 1975 to educate the public regarding the value of the visual arts to society; to advocate for visual arts issues for its members and the arts community; to provide professional and educational services for artists and the arts community; and to improve the environment in which artists work and live. The CAC is committed to combatting the rising trend of censorship of artists and art organizations.

The Christic Institute is a public interest law firm and religious public policy center with a national network of 75,000 people. The Institute is dedicated to the objective of protecting the free and unrestricted expression by citizens of their religious, social and political views.

Clergy and Laity Concerned (CALC) is a national peace and justice organization of 24,000 members that was founded by Dr. Martin Luther King, Jr., Rabbi Abraham Joshua Heschel, Dr. William Sloan Coffin, Dr. John Bennet and Father Daniel Berrigan. CALC was formed as a vehicle to organize against the war in Vietnam.

The Committee for Artists' Rights (CFAR) was formed in 1988 to stem the growing trend of censorship in the arts. CFAR enlists over 1,200 artists, art supporters and art organizations in making a unified statement on the dangers of censorship imposed by any outside force, including government or small interest groups, for moral, ethical or political gains. Our position is that the right to freedom of speech exists for the health and well-being of our society. CFAR is

against any effort to censor, ban or outlaw symbolic speech whether it is verbal or visual.

The Committee of Interns and Residents (CIR) is a labor organization within the meanings of the national labor relations laws of the United States and the State of New York as well as other jurisdictions and represents 5,000 house staff officers (interns, residents and fellows) in hospitals and health care facilities in New York, New Jersey and Washington D.C. CIR's members often engage in demonstrative as well as verbal expressions of their views on professional, political and union-management affairs. They oppose any limitation by government on freedom of expression, symbolic or verbal, grounded on disagreement with its content or form.

The Community For Creative Non-Violence (CCNV) is an unincorporated association based in the District of Columbia that supplies food, shelter, and other assistance to homeless persons. Formed in 1970 in response to the war in Vietnam, CCNV has focused predominantly on poverty issues since 1976. There are 50 members of the community, many of whom were formerly homeless. On numerous occasions CCNV has conducted demonstrations to focus attention on the poor and often uses symbolic speech, in a wide variety of forms.

The Emergency Committee to Stop the Flag Amendment and Laws (formerly the Emergency Committee on the Supreme Court Flag-Burning Case) was formed when the Supreme Court accepted *Texas v. Johnson* in October 1988. Its members hold diverse views on flag-burning and political dissent; however, they all vehemently oppose the efforts by the government to legislate mandatory patriotism by enacting the Flag Protection Act or by threatening to amend the Bill of Rights. The Emergency Committee helped coordinate *amici* in *Texas v. Johnson* and in these cases. It submitted testimony to Congress in opposition to proposed statutory and constitutional amendments to circumvent *Texas v. Johnson*. The Emergency Committee has strongly supported these

defendants' open defiance of the Flag Protection Act in Seattle and Washington D.C., as well as the many flag-burnings involving thousands across the country, as a positive expression that all efforts to criminalize flag "desecration" and compel government-defined patriotism will be resisted.

The Fellowship of Reconciliation (FOR) is an international religious pacifist organization founded 74 years ago. FOR has 36,000 members. Throughout its history FOR has been concerned with the issues of freedom of speech and political persecution of citizens by their governments for the expression of political dissent.

The Fund for Free Expression was formed in 1975 by a group of authors, publishers, journalists and interested individuals to champion Article 19 of the Universal Declaration of Human Rights, adopted by the General Assembly of the United Nations on December 10, 1948. Article 19 guarantees "the right of people the world over to express themselves freely without fear of retribution, the right to hold opinions without inference and the right to seek, receive and impart information through any media regardless of frontiers." The Fund is the United States sponsor of *Index on Censorship*, an international journal of record that reports censorship problems all over the world. The Fund is also the United States sponsor and an organizing agency of ARTICLE 19, the newly created International Centre on Censorship based in London. The Fund is part of Human Rights Watch, which also includes the Africa Watch, Americas Watch, Asia Watch, Helsinki Watch and Middle East Watch Committees which monitor human rights practices in the specific areas of the world.

Humanists of Washington (HOW) is a statewide free thought association dedicated to the principles of Secular Humanism. It espouses a life-affirming, secular view of the universe built on a foundation of reason, science, and democracy. It supports intellectual freedom, free inquiry, critical thinking, and human compassion. HOW holds that a full range of civil rights for all people is necessary to achieve full

empowerment of the individual in society. This statement may not be endorsed in every detail by every member of HOW, but it does represent the collective ideas encompassed by the group.

The Illinois Arts Alliance supports public policy and legislation favorable to the arts in Illinois and the nation. The Alliance is supported totally through the contributions of its 1,000 individual and organizational members. In 1989, the Alliance publicly supported the right of the School of Art Institute of Chicago to display a student's work in which the U.S. flag was on the floor. Consequently, the Illinois General Assembly denied state funding to the Illinois Arts Alliance Foundation. The Alliance maintains that the decision of the School to display the flag was consistent with the fundamental freedom of speech and expression guaranteed by the First Amendment to the Constitution.

Lambda Legal Defense and Education Fund, Inc. (Lambda), founded in 1973, is the nation's oldest and largest legal advocacy organization working in support of the rights of lesbians and gay men. It has 10,000 active supporters. The protection of the rights to free speech and association is of utmost importance to Lambda's work and to the community it represents. The escalation of incidents of violence against lesbians and gay men and the AIDS epidemic have forced the gay and lesbian community to become more vocal in its attempts to achieve equal protection under the law. Lambda believes it must strive to protect its freedom of speech and association as a means of making its members' voices heard.

The Lawyers Committee On Nuclear Policy (LCNP), founded in 1981, is a national, non-profit educational association of 600 lawyers and legal scholars in 42 states and 11 foreign countries concerned with legal aspects of the nuclear weapons debate. LCNP supports the abolition of nuclear weapons through the promotion and strengthening of law and non-violent mechanisms for resolving international disputes, and believes that citizens have a fundamental right and

obligation to protest against government activity that the Committee perceives to be illegal.

The Modern Language Association of America (MLA) is a learned society. It was established in 1883 by scholars and teachers who sought a forum for scholarly exchange and a way of ensuring the effective teaching of English and other modern languages and literatures at a time when the modern languages—as opposed to classical Greek and Latin—were gaining a place in the school and college curricula. The membership has sustained the association's original commitment for over a century. The MLA has 32,000 members. They are primarily college and university professors of English and other modern languages as well as graduate students in these fields. The MLA has a long-standing commitment to the right of authors to free expression and the right of all people to read and interpret for themselves. In this context the MLA Executive Council thinks it important to protect the right to dissent.

The Nation Institute is a private, non-profit foundation which undertakes research, educational programs and other projects concerned with civil rights and civil liberties, particularly those protected by the First Amendment.

The National Conference of Black Lawyers (NCBL) is an activist organization of lawyers, law professors, judges, law students and legal workers dedicated to serving as the legal arm of the Black community. Since its founding in 1968, NCBL has been actively involved in the continuing struggle against racial discrimination and political repression. NCBL resolutely supports the right of individuals and groups to freely express themselves in speech—whether direct or symbolic.

The National Emergency Civil Liberties Committee, having 10,000 members, is an organization which since 1951 has been concerned with the protection of the constitutional rights of American citizens and persons residing in the United States. Its particular interest has been with the First Amend-

ment. In that connection, it has represented numerous individuals and organizations before this Court.

The National Lawyers Guild is an association of over 7,000 attorneys, law students, legal workers and jailhouse lawyers. The Lawyers Guild has been at the forefront of the effort to defend and expand the constitutional protection of First Amendment freedoms since its founding in 1937.

The New York Criminal Bar Association is an organization consisting of more than four hundred New York City attorneys, both in the private sector and in the public defender ranks, who are engaged in the practice of criminal law at the trial and appellate level. The Association is concerned with safeguarding the due process and First Amendment rights of attorneys at the defense bar, the clients whom those attorneys represent, and all persons whose civil or constitutional rights may be imperiled by private or governmental encroachment.

The New York State Association of Criminal Defense Lawyers is a statewide organization of lawyers with 750 members whose principal concern is the protection of the constitutional safeguards embodied in the Bill of Rights, including the First Amendment rights of criminal defendants and all other citizens.

PEN American Center is a nonpartisan, nonprofit organization of over 2,500 writers and an affiliate of International P.E.N., a worldwide association of poets, playwrights, essayists, editors and novelists. PEN works for the unhampered transmission of thought within every nation and between all nations and is opposed to all forms of suppression of freedom of expression in the countries and communities to which its members belong. Since 1960, American PEN has been fighting against restrictive laws, rules, regulations and practices that censor, curb or limit freedom of speech or expression in the United States.

Refuse & Resist (R&R) is a national organization which challenges the entire agenda of right-wing attacks and repression in the U.S. R&R opposes restrictions on abortion rights,

mass round-ups and detention of immigrants, increasing racism, homophobia, and all attempts to legislate morality. The R&R Statement of Unity, signed by over 1,000 people nationwide, says: "There can be no communality of purpose, healing of division, or coming together as one nation behind this new [reactionary] course. To acquiesce further in silence is to be complicit" R&R supports the right of people to express their dissent including by burning the American flag.

Theatre Communications Group is the national organization for the nonprofit professional theatre. Founded in 1961, its services and programs facilitate the work of thousands of actors, artistic and managing directors, designers, trustees and administrative personnel, as well as a constituency of more than 300 theatre institutions across the country. Central to TCG's mission is its fervent belief in freedom of expression for all artists.

The United Electrical, Radio and Machine Workers of America (UE) is a national labor organization committed to organizing workers regardless of craft, race, nationality, sex, age, religion, political belief, or immigration status and to representing and defending its membership in their efforts to improve their wages, working and living conditions. The UE has a proud history of fighting for the rights of all of its members, not only in the work place but in the courts and legislative arena as well.

Wabun-Inini, Anishinabe (a/k/a Vernon Bellecourt) is a representative of the American Indian Movement (AIM) which was formed to carry on the 500-year struggle for survival of the original and natural peoples of this land. He supports, on behalf of AIM, symbolic expression that is crucial for protest to be heard.

Vietnam Veterans Against the War Anti-Imperialist (VVAW AI) is the organization of veterans who initiated the "Festival of Defiance" in Seattle, Washington on October 28, 1989, where it announced its opposition to the Flag Protection Act of 1989 and where a member of its organization defied it by "napalming" 1,000 flags. Another member of

VVAW AI was one of the four people who challenged the law by burning flags on the steps of the Capitol in Washington, D.C. VVAW AI is opposed to the Flag Desecration Act of 1989 and to any attempts to amend the constitution to "protect" the flag.

The War Resisters League (WRL) was founded in 1923 as an organization committed to non-violence and to finding alternatives to war. It has 13,000 members. WRL rejects all use of organized violence in civil war, revolution, or in defense of the state, and has generally supported the ideas of Mahatma Gandhi and Dr. Martin Luther King, Jr.

The Writers Guild of America, East (WGAE) is a union of writers in screen and television, having over 3,200 members. The WGAE, which is affiliated with the AFL-CIO, believes in the protection of free expression and actively opposes attempts to weaken the First Amendment to the U.S. Constitution.

The Writers Guild of America, west is a union of writers in screen, television and radio, having over 7000 members. The Guild believes in the protection of free expression and actively opposes attempts to weaken the First Amendment to the U.S. Constitution.